IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-621

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE STATE OF ARIZONA

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

DANIEL JESSE SMITH
Chief Deputy Appellate Division
Pima County Attorney
900 Pima County Courts Building
111 West Congress Street
Tucson, Arizona 85701
Attorney for Petitioner

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OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet.App. 3a-38a) are reported at 608 F.2d 1197. The decision of the District Court (*Pet.App. 41a-57a) is reported at 445 F.Supp. 1123.

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*Pet.App. refers to the appendix in the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals (Pet.App. 1a-2a) was entered on July 9, 1979. A Petition For Rehearing And Suggestion For Rehearing En Banc was denied on September 10, 1979 (Pet.App. 60a-61a). The time for filing the Petition For A Writ Of Certiorari was extended ten days until October 20, 1979 by order of Justice Rehnquist on October 2, 1979. The Petition For A Writ Of Certiorari was filed on October 13, 1979. On January 7, 1980, this Court invited the Solicitor General to file a brief expressing the views of the United States. In March, 1980, the Solicitor General filed its brief. The Petition For A Writ Of Certiorari was granted on April 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether a state is stripped of all appellate rights when a state criminal prosecution is removed to Federal Court pursuant to 28 U.S.C. 1442(a)(1).

II. Whether a Federal District Court has jurisdiction to enter a judgment of acquittal on its own motion eleven months after the jury has returned a guilty verdict, and beyond the seven-day period provided for in Federal Rule of Criminal Procedure 29(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited

by it to the states, are reserved to the states respectively, or to the people."

18 U.S.C. 3731 provides in part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes."

28 U.S.C. 1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. 1442(a)(1) provides:

> "(a) A civil action or criminal prosecution commenced in a State

court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

28 U.S.C. 1651 provides in relevant part:

"1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Federal Rule of Criminal Procedure 29(c) provides:

"(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or

renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Rule 3 of the Rules of Procedure For Special Actions (Volume 17a of Arizona Revised Statutes) reads:

"Rule 3. Questions Raised

The only questions that may be raised in a special action are:
(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
(b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
(c) Whether a determination was arbitrary and capricious or an abuse of discretion."

STATEMENT

1. On March 15, 1976 at 9:00 p.m. Respondent MANYPENNY was on duty as a United States Border Patrol agent (Tr.* 146, 155, 281). Respondent MANYPENNY, along with Border Patrol Agent Hjelle, were suppose to stop and take into custody undocumented aliens entering the United States through a well-known undocumented alien route, Sweetwater Pass, located within Pima County, Arizona (Tr. 44, 243). Neither agent was in uniform (Tr. 16, 249). Three Mexican males were heading north on foot, seeking work. They had nothing with them but food and clothing (Tr. 15, 23, 294). One of the three aliens, victim Elfego Mendoza, when confronted by Agent Hjelle, turned and ran south along the path back towards

---

*Tr. refers to reporter's transcript of Respondent's trial.

the Mexican border (Tr. 273, 284). When victim Mendoza was approximately 150 feet south and below where Respondent MANYPENNY was positioned, (Tr. 259) Respondent MANYPENNY fired his pump action twelve-gauge shotgun three separate times (Tr. 61, 170, 176, 178). Three twelve-gauge shotgun shells were found within eight inches of one another (Tr. 62).

Two of the three shotgun shells contained birdshot, the third shell contained double ought buckshot (Tr. 66). At least one of the two shells containing birdshot hit the victim in the buttocks, causing multiple wounds (Tr. 105-106). One of the pellets from the double ought buckshot shell hit the victim in the back of his neck, (Tr. 55) severing his spinal cord (Tr. 59), turning him into a quadra-plegic (Tr. 85, 86). The moon was almost

full at that time and Respondent MANYPENNY could see the victim (Tr. 153, 254-5, 272).

Border Partol Agent Hjelle and the two other aliens approached the victim to see what the shots were about. Respondent refused their request to shine a light on the victim. Respondent assured them that the victim had not been shot, but had slipped and fallen (Tr. 22). Respondent took the victim to the hospital and told the attending physician he had found the victim in that condition. After x-rays revealed the true cause of the victim's condition, Pima County Deputy Sheriff Keele went to the hospital to investigate that same night. Respondent told Keele, in the presence of the doctor, that he had found the victim in that condition and surmised that the victim must have slipped and fallen (Tr. 35-39). Deputy Keele was

a good friend of the Respondent, and after they walked out of the hospital, Deputy Keele again asked Respondent what had occurred. Respondent repeated his story that he had found the victim in that condition (Tr. 39,41). Respondent then suggested to Deputy Keele that the two other aliens, who were potential witnesses against him, be deported. Deputy Keele rejected this suggestion (Tr. 40-41). Keele requested Respondent accompany him to his office, where Respondent at first stuck with his original story of finding the victim already injured. After further conversation, Respondent admitted to firing one shot at a rock, and guessed that one of the double ought buckshot hit the victim as a result of a ricochet. Respondent was specifically questioned by Deputy Keele on this point, and insisted he only shot once

(Tr 42). This conversation was prior to any crime scene investigation (Tr. 43).

Two weeks later, Respondent MANYPENNY, with his attorney present, had a conversation with two Pima County, Arizona prosecutors, concerning the events surrounding the shooting. At this time Respondent MANYPENNY gave three different versions of what had occurred (Tr. 112-120).

At trial, Respondent took the stand and testified that he fired the first shot into the air as a warning shot (Tr. 170); the second shot went off because the gun misfired while he was reloading (Tr. 176); the third shot also went off by accident according to Respondent (Tr. 178). Respondent testified that the three shots discharged while he was in three different places along the trail in pursuit of the victim (Tr. 175-177, 257-259). Respondent testified that "I did not intentionally point and fire that shotgun at

anyone that night" (Tr. 241). Respondent had "no idea" as to why all three shells were found within eight inches of one another in a location different from where Respondent claimed the various shots went off (Tr. 268). Respondent MANYPENNY testified that he knew it was only a misdemeanor to enter the United States illegally (Tr. 123); and that he knew he was not allowed to shoot a misdemeanor offender (Tr. 274, 311). Respondent admitted that the general procedure he and other Border Patrolmen follow when an alien eludes capture and runs south toward Mexico, is to let the alien go. Respondent further testified that "we never attempt to use force taking anybody into custody" (Tr. 273-274).

2. Respondent MANYPENNY was charged by the State of Arizona with Assault With

A Deadly Weapon in violation of A.R.S. § 13-249(A) and (B). On Respondent MANYPENNY'S motion (filed July 20, 1976), the case was removed to Federal Court for trial pursuant to 28 U.S.C. § 1442(a)(1). After a trial held on November 4 and 5, 1976, the jury returned a verdict of guilty as charged on November 6, 1976. Respondent MANYPENNY then timely moved for arrest of judgment, or in the alternative, for a new trial pursuant to Federal Rules of Criminal Procedure 33 and 34. The Federal District Court granted the Respondent's Motion For Arrest Of Judgment on November 30, 1976, 24 days after the verdict. The Petitioner then moved for reconsideration of this ruling. The Federal District Court granted the Petitioner's motion for reconsideration of its ruling on December 6, 1976, but took no further action for almost one year. On

September 8, 1977, Respondent MANYPENNY moved for a hearing to determine the status of the Petitioner's pending motion. This hearing was held on September 26, 1977. Two days later, the District Court reversed its previous order arresting judgment. The District Court, sua sponte, decided to construe Respondent MANYPENNY'S Rule 34 Motion For Arrest Of Judgment as a Rule 29(c) Motion For Judgment Of Acquittal, despite the fact that Respondent MANYPENNY had never filed a Rule 29(c) motion. The District Court then granted its own Motion For Judgment Of Acquittal, and held Respondent MANYPENNY not guilty. Arizona v. Manypenny, 445 F.Supp. 1123 (D. Ariz. 1977) (Pet.App. at 41a-57a).

3. The Petitioner filed a timely Notice Of Appeal pursuant to 18 U.S.C. 3731. The Court of Appeals for the Ninth Circuit

originally issued a per curiam opinion on July 31, 1978, dismissing the Petitioner's appeal on double jeopardy grounds (Pet. App. 39a-40a).

The Petitioner then filed a timely Petition For Rehearing And Suggestion For Rehearing En Banc.

4. On July 9, 1979, the Court of Appeals granted the Petitioner's Petition For Rehearing, withdrew its prior opinion and substituted the instant majority and dissenting opinions (Pet.App. 1a-38a). The majority, per Judge Choy, acknowledged that:

> "We share the concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to 'prevent erroneous trial court rulings from thwarting lawful prosecutions,' is equally applicable to state prosecutions and federal prosecutions, and that not allowing state appeals in cases removed to the federal courts under § 1442(a)(1) has a substantial effect on the

> delicate balance of our federal system." (Pet.App. at 8a)

Nonetheless, the majority concluded that:

> ". . . only Congress can authorize an appeal by a state in a § 1442(a)(1) criminal prosecution. Thus far, Congress has not seen fit to do so. Therefore, we hold that we are without jurisdiction to entertain this appeal.
>
> APPEAL DISMISSED." (Pet.App. at 11a.)

The majority did not reach or discuss the merits of the Petitioner's appeal.

Judge Kennedy, in his dissent found that:

> "There are two possible sources of jurisdiction, 18 U.S.C. § 3731 and 28 U.S.C. § 1291." (Pet.App. at 15a.)

Judge Kennedy's dissent first examined the jurisdictional issue at length and found that both 18 U.S.C. 3731 and 28 U.S.C. 1291 could serve as a jurisdictional basis for the Petitioner's appeal (Pet.App. 15a-23a).

Judge Kennedy then considered possible double jeopardy problems posed by the Petitioner's appeal and concluded there was no double jeopardy barrier to this appeal (Pet.App. 24a-30a). Turning to the merits of the District Court's ruling, Judge Kennedy rejected the Petitioner's contention that the District Court was without jurisdiction to sua sponte enter a Judgment Of Acquittal eleven months after the jury returned a guilty verdict. Judge Kennedy's dissent noted that:

> "At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal. United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437, 439 (10th Cir. 1968). See also United States v. Homer, 411 F.Supp. 972, 975 (W.D. Pa.), aff'd on other grounds, 545 F.2d 864 (3rd Cir. 1976), cert. denied, 431 U.S. 954 (1977). The defendant did file motions for arrest of

> judgment and for a new trial within the time limits prescribed by rules 29(c) and 34. The court having retained jurisdiction over the case, I think it had discretion to consider entry of a judgment of acquittal on its own motion, where it was convinced there had been a fundamental error in its instructions, Fed. R. Crim. P. 2.
>
> I conclude further, however, that the trial court misused its discretion in granting a judgment of acquittal." (Pet.App. 30a-31a)

Judge Kennedy's dissent then discussed the merits of the Petitioner's appeal and concluded his dissent by stating:

> "I would hold that this court has jurisdiction and reverse and remand." (Pet.App. at 34a)

5. On August 13, 1979, the Court of Appeals, acting upon the Petitioner's request, issued an order amending the dissenting opinion to correct a factual error (Pet.App. 58a-59a). The opinion of the Court of Appeals (Pet.App. 1a-38a) was reproduced in the Petition For Certiorari

as amended by the Court's order of August 13, 1979.

6. The Petitioner filed a timely Petition For Rehearing And Suggestion For Rehearing En Banc, which was denied on September 10, 1979 (Pet.App. 60a-61a).

7. On October 2, 1979, Justice Rehnquist, acting on Petitioner's motion, extended the time for filing this petition a period of ten days until October 20, 1979.

8. Petitioner filed its Petition For Writ Of Certiorari on October 13, 1979.

9. On January 7, 1980, this Court entered an order inviting the Solicitor General of the United States to file a brief expressing the views of the United States.

10. In March, 1980, the Solicitor General filed an Amicus Brief for the United States. It was the opinion of the

Solicitor General that certiorari should be granted, and that the judgment of the Ninth Circuit should be reversed (Amicus Brief, p. 10). The Solicitor General was of the opinion that both 18 U.S.C. 3731 and 28 U.S.C. 1291 gave the Court of Appeals jurisdiction to consider the Petitioner's appeal. The Solicitor General did not address the second issue presented for review by Petitioner (Amicus Brief, p. 1, footnote 1).

11. On April 14, 1980, the Petition For a Writ of Certiorari was granted by this Court.

SUMMARY OF ARGUMENT

I.

The first question presented by this case is whether a State government is reduced to second class status and stripped of its right to appeal when a State criminal prosecution is removed to federal court pursuant to 28 U.S.C. 1442(A)(1).

A. In Tennessee v. Davis, 100 U.S. 257 (1880) the Court ruled that in removal prosecutions, federal courts are to apply state substantive law and federal procedural law. This Court-made rule is codified in Rule 54(B)(1) of the Federal Rules of Criminal Procedure. In Colorado v. Symes, 286 U.S. 510 (1932) this court stated that the right of the states "to make and enforce their own laws is equal to the right of the federal government" and that the removal statute

"is to be construed with highest regard for such equality." 286 U.S. at 518. Irrespective of whether the right of the government to appeal in a criminal case is deemed substantive or procedural, the Petitioner has the right to an appeal since Arizona law allows appellate review in the circumstances of the instant case.

The majority in the Ninth Circuit ruled they were without jurisdiction to consider this appeal because Congress has never explicitly authorized appeals by states in removal prosecutions. In so ruling, the majority overlooked the rule set forth in Bell v. Hood, 327 U.S. 678 (1946) that where legal rights have been invaded "Federal Courts may use any available remedy to make good the wrong done." 327 U.S. at 684.

B. 18 U.S.C. 3731 which authorizes appeals by the "United States" in criminal cases, provided the Court of Appeals with a jurisdictional basis for this appeal. 18 U.S.C. 3731 contains a provision which reads: "The provisions of this section shall be liberally construed to effectuate its purposes." The original Criminal Appeals Act was passed to prevent a single federal district judge from having the unreviewable power to defeat any criminal prosecution instituted by the government. United States v. Sisson, 399 U.S. 267, 293 (1970). In enacting the current version of 18 U.S.C. 3731, this court stated that: "Congress intended to remove all statutory barriers to government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975).

Congress did not need to consider the application of 18 U.S.C. 3731 to removal cases since Tennessee v. Davis was the law of the land long before 18 U.S.C. 3731 or its predecessor was enacted. Congress' failure to specifically consider this issue cannot be construed as indicating an intent on the part of Congress to reduce the states to the second class status they enjoyed as colonies prior to the American Revolution. The Removal Bill passed by Great Britain in 1774 constituted one of the enumerated grievances that made up the Declaration of Independence.

C. 28 U.S.C. 1291 which provides for review of "all final decisions" of the United States District Court provides a second jurisdictional basis for this appeal.

In United States v. Sanges, 144 U.S. 310 (1890) this Court merely held that the "United States" may not appeal a ruling

in favor of a defendant until Congress passed a statute that expressly gave the United States Government the right to appeal in a criminal case. Sanges was not a removal case, and the Sanges decision never had any application to the right of state governments to appeal in criminal cases.

The rationale behind the Sanges rule was that appeals by the sovereign in criminal cases were historically disfavored. This 1892 rationale no longer exists since the Federal Government, the State of Arizona, and the overwhelming majority of the 50 states currently allow appeals by the government in criminal cases. Current congressional policy also favors allowing state governments the use of the federal appellate courts to appeal decisions in favor of state criminal defendants.

D. This Court's long standing policy that statutes should be construed so as to save

them from constitutional attack requires this Court to construe 18 U.S.C. 3731 or 28 U.S.C. 1291 as allowing for appeals by state governments in removal prosecutions.

If this Court does not construe either statute as permitting appeals by state governments in removal prosecutions, the Removal Statute will be subject to attack on Tenth Amendment grounds. National League of Cities v. Usery, 426 U.S. 833 (1976). Allowing a federal district court unreviewable powers to block any state prosecution involving a federal officer represents a serious encroachment on state sovereignty and violates many of this Court's teachings on federalism. The Majority decision makes the Removal Statute subject to attack on "overbreadth" grounds since this overly broad windfall benefit to federal officers does not further any of the purposes the Removal Statute was designed to serve.

18 U.S.C. 3731 will also be vulnerable to constitutional attack on Fifth Amendment equal protection grounds. The majority construed 18 U.S.C. 3731 as setting up two distinct classes of defendants in Federal District Court: (1) The run-of-the-mill federal defendant who is subject to a prosecution appeal challenging rulings in his favor; and (2) The removal defendant, federal officers who now constitute a special privileged class, free to enjoy the unreviewable benefits of errors committed in their favor by the District Court. There is no rational basis for such a distinction, and the equal protection rights of the non-privileged federal defendant are violated each time the Federal Government files an appeal pursuant to 18 U.S.C. 3731.

E. The Mandamus Statute 28 U.S.C. 1651 provided the Court of Appeals and provides this Court with jurisdiction to consider Petitioner's

contention that the District Court was wholly without jurisdiction to sua sponte enter a judgment of acquittal eleven months after the jury returned a guilty verdict.

In United States v. Denson, 603 F.2d 1143 (1979) the En Banc Fifth Circuit held that when "mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." 603 F.2d at 1145. This Court stated in Maryland v. Soper, (No. 1) 270 U.S. 9 (1925) that: "There should a more liberal use of mandamus" in removed state criminal prosecutions. 270 U.S. at 29.

For the reasons discussed in Argument II, infra, the entry of the judgment of acquittal by the District Court was a nullity since the District Court was without jurisdiction to have entered such an order. Since the District Court "overreached its judicial power

to deny the government the rightful fruits of a valid conviction" Will v. United States, 389 U.S. 90, 97-98 (1967) the Ninth Circuit should have issued a Writ of Mandamus ordering the District Court to reinstate the guilty verdict.

II.

The second question before this Court is whether a Federal District Court has jurisdiction to sua sponte enter a judgment of acquittal beyond the 7-day time limit provided for in Federal Rule of Criminal Procedure 29(C).

The lower federal courts have consistently held that unless a motion is filed, or an extension of time is granted within the 7-day limit, the District Court loses its jurisdiction to consider such a motion. Respondent filed timely post-trial

motions seeking a new trial pursuant to Federal Rule of Criminal Procedure 33 and a timely motion in arrest of judgment pursuant to Federal Rule of Criminal Procedure 34. Neither motion attacked the sufficiency of evidence in the government's case, which is the sole ground for granting a judgment of acquittal. Therefore, neither post-trial motion could be fairly construed as a motion for judgment of acquittal.

In United States v. Smith, 331 U.S. 469 (1947) this Court held that the similar time limitation for Rule 33 Motions was jurisdictional. Petitioner submits that there is no rationale for ignoring the time limitation set forth in Rule 29(C), since the identical sufficiency of the evidence claim can be litigated on direct appeal or in a collateral attack pursuant to 28 U.S.C. 2241. When the District Court is reviewing a jury's guilty

verdict pursuant to Rule 29(C), the District Court sits as a reviewing court, not as the finder of the fact. The standard of review to be applied by the District Court and a Federal Appeals Court in this situation is identical, so a defendant suffers no legally cognizable detriment by having an appeals court pass on his sufficiency of the evidence claim.

ARGUMENT

I.

A STATE GOVERNMENT IS NOT REDUCED TO SECOND CLASS STATUS AND STRIPPED OF ITS RIGHT TO APPEAL WHEN A STATE CRIMINAL PROSECUTION IS REMOVED TO FEDERAL DISTRICT COURT

A. FEDERAL COURTS MUST APPLY THE SUBSTANTIVE LAW OF THE STATE AND FEDERAL PROCEDURE IN A REMOVAL PROSECUTION; IRRESPECTIVE OF WHETHER THE GOVERNMENT'S RIGHT TO APPEAL IS DEEMED SUBSTANTIVE OR PROCEDURAL, THE STATE OF ARIZONA HAS A RIGHT TO APPEAL IN THIS CASE

In Tennessee v. Davis, 100 U.S. 257 (1880), the State of Tennessee challenged the validity of the removal statute then in effect on the grounds, inter alia, that Congress had failed to specify any mode of procedure for the trial of removal cases. This Court acknowledged that Congress had neglected to prescribe any procedure, yet dismissed these "imaginary difficulties and incongruities" as "unreal" and held the "mode of trial is sufficiently obvious." This Court went on

to establish the rule that when state criminal prosecutions are removed to Federal Court, the Federal Court is to apply state substantive law and federal procedural law. 100 U.S. at 271-272. See also, Carter v. Tennessee, 18 F.2d 850; and Miller v. Commonwealth of Kentucky, 40 F.2d 820. The Advisory Committee Note to Federal Rule of Criminal Procedure 54(b)(1) (which governs removal proceedings) states this Rule in no uncertain terms.[1]

1/ The Advisory Committee Note to Rule 54(b)(1) reads in relevant part:

> "In such cases the Federal court applies the substantive law of the State, but follows Federal procedure; State of Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648; Carter v. Tennessee, 18 F.2d 850, C.C.A. 6th; Miller v. Kentucky, 40 F.2d 820, C.C.A. 6th; see, also, State v. Maryland v. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449. The rule is, therefore, a restatement of existing law, except that it does not affect whatever power the State prosecutor may have as to dismissal."

If this Court deems such right to be substantive,[2] then Arizona law unquestionably authorizes appellate review in this type of case.[3]

2/ Whether the right to appeal is deemed a substantive or procedural right is irrelevant to the proper resolution of this case from the standpoint of the instant Petitioner, since Arizona law provides for appellate review in the circumstances of the instant case. Therefore, Petitioner has not briefed this issue and expresses no position on it. See, Brief For The United States As Amicus Curiae (p. 9-10). If this Court is interested in resolving this issue, Judge Kennedy's dissent discusses it at length in his Footnote One (Pet.App. 35a-37a).

3/ See, State ex rel. Hyder v. Superior Court, ____ Ariz. ____, 606 P.2d 411 reproduced on pp. 4-8 of the Supplement To Petition For Writ Of Certiorari, filed March 3, 1980 and cases cited in Judge Kennedy's dissenting opinion (Pet.App. 21a-24a and 38a). See also, Rule 3 of Rules of Procedure for Special Actions, Volume 17A of Arizona Revised Statutes, reproduced at p. ____ supra) and Article VI, Section 5 of the Arizona Constitution, as amended, Volume I of Arizona Revised Statutes.

If this Court deems such right to be procedural, then Tennessee v. Davis and its progeny mandate that in a removal prosecution the state government has all the procedural rights of the United States Government, including the same right to appeal pursuant to 18 U.S.C. 3731. See, Colorado v. Symes, 286 U.S. 510 at 518 (1932) quoted in Argument D, infra, pg. 69.

The majority in the Ninth Circuit ruled that they were without jurisdiction to entertain this appeal because Congress has never explicitly authorized such an appeal (Pet.App. 11a). In so ruling, they not only ignored the rule set out in Tennessee v. Davis, supra, but also ignored the well settled rule that "where legal rights have been invaded and a federal statute provides for a general right to

sue for such invasion, Federal Courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678 (1946) at 684. See also, Bivens v. Six Unknown Named Agents Of Federal Bureau Of Narcotics, 403 U.S. 388 (1971) at 392; and Carlson v. Green, ____ U.S. ____ (1980). Petitioner's Tenth Amendment Rights have been invaded here, (discussed in part D infra) and this Court may imply a remedy under the Constitution as it did in Bivens and Carlson.

Three federal statutes give the Ninth Circuit jurisdiction to hear the instant appeal: 18 U.S.C. 3731; 28 U.S.C. 1291; and 28 U.S.C. 1651. Petitioner submits that even if Tennessee v. Davis, Colorado v. Symes, and Rule 54(b)(1) did not exist, any one of these statutes standing alone is sufficient to authorize this appeal. (discussed infra).

B. CONGRESS DID NOT INTEND TO PRECLUDE APPEALS BY STATE GOVERNMENTS IN REMOVAL CASES WHEN IT ENACTED 18 U.S.C. 3731

The majority's ruling, that the use of the term "United States" in 18 U.S.C. 3731 precludes use of this statute as a jurisdictional basis for the instant appeal, ignores the very language of 18 U.S.C. 3731 itself that states: "(E) The provisions of this section shall be liberally construed to effectuate its purposes."

This Court has repeatedly held that a remedial statute should be construed broadly to effectuate its purposes. Tcherepnin v. Knight, 389 U.S. 332 at 336 (1967); Peyton v. Rowe, 391 U.S. 54 at 65 (1968).

This Court stated long ago in Stewart v. Kahn, 78 U.S. 493 (1870) that:

> "A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker con-

> stitutes the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment." 78 U.S. at 504.

The principles set forth in Stewart v. Kahn have not been eroded in the intervening years. Kokaszka v. Belford, 417 U.S. 642 at 650 (1974); Philbrook v. Glodgett, 421 U.S. 707 at 713-714 (1975).

This Court has already interpreted the legislative intent behind both 18 U.S.C. 3731 and its predecessor. In United States v. Sisson, 399 U.S. 267 (1970), this Court discussed the concerns of Congress that led to the enactment of the predecessor of the current version of 18 U.S.C. 3731. This Court stated:

> "Their primary purpose was perhaps best expressed by Attorney General Miller in his 1892 report: 'As the law now stands . . . it is in the power of a single district judge, by quashing an indictment, to defeat any criminal prosecution instituted by the Government.'" 399 U.S. at 293. (Emphasis added.)

In construing the current version of 18 U.S.C. 3731, this Court stated in United States v. Wilson, 420 U.S. 332 (1975):

> "While the language of the new Act is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." 420 U.S. at 337. (Emphasis added)[4]

4/ The majority opinion per Justice Marshall refers to the prosecution as the "Government" thirty-nine times in his majority opinion, and only uses the term "United States" one time, (420 U.S. at 338) to refer to the prosecution. The dissent uses the term "Government" six times and never uses the term "United States" except in citing the names of previous cases. Petitioner submits that this Court, perhaps more than any other institution in the entire world, is aware of the importance of the careful and precise use of language. If this Court used the words "United States" and "Government" interchangeably, then in the complete absence of anything in the Congressional record to suggest that Congress intended to restrict the rights of states to appeal in removal prosecutions, it is tenuous at best to read the term "United States" as manifesting an intent on the

Accord, see, United States v. Helstostki, 61 L.Ed.2d 12 (1979) footnote 6 found at 61 L.Ed.2d at 22. As the Solicitor General pointed out in his Amicus Brief:

> "Congress gave no specific consideration to the right of appeal of a state prosecuting in federal court, although the frequent references in the legislative history to 'Government' appeals suggest that Congress would have treated the states just as the United States, if Congress had felt that state appeals would be barred unless authorized in Section 3731. See, e.g., S.Rep. No. 1296, 91st Cong., 2d Sess. 2 (1970)." Amicus Brief p. 8-9.

Indeed, even the majority in the Ninth Circuit conceded that their decision frustrated the clear Congressional intent behind 18 U.S.C. 3731: "We share the

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part of Congress to preclude a state from exercising the substantive or procedural right to appeal provided for in Tennessee v. Davis. This is especially true in light of the "liberally construed to effectuate its purposes" language found in the statute itself.

concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to 'prevent erroneous trial court rulings from thwarting lawful proseuctions,' is equally applicable to state prosecutions and federal prosecutions. . ." (Pet. App. 8a).

That Congress did not specifically consider the application of 18 U.S.C. 3731 to the states is not surprising in light of the relative rarity of removal prosecutions and the fact that Tennessee v. Davis was the law of the land long before 18 U.S.C. 3731 or its predecessor was enacted into law.[5] Congress could not have anticipated

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5/ Tennessee v. Davis was decided in 1880; the predecessor to the current version of 18 U.S.C. 3731, The Criminal Appeals Act Of 1907, was as its title indicates, passed in 1907. See United States v. Sisson, supra, 399 U.S. at 293-296.

that the Ninth Circuit would misinterpret Tennessee v. Davis and Rule 54(b)(1) in its ruling on this issue in 1979, when Congress amended 18 U.S.C. 3731 in 1971. Petitioner submits that this issue was settled back in 1880, and the failure of Congress to specifically address an issue in 1971 that did not need addressing, cannot fairly be interpreted as meaning that Congress intended to deny a state the right to appeal in a removal prosecution.

Moreover, even if this Court is of the view that this issue is not controlled by Tennessee v. Davis, and was in fact left open by Congressional oversight, this Court has held that in fashioning federal principles to govern areas left open by Congress, the function of this Court is to effectuate Congressional policy. United States v.

Kimbell Foods Inc., 440 U.S. 715 at 727 (1979). This Court has also stated that when a statute is ambiguous, construction should go in the direction of constitutional policy. Blanchette v. Connecticut General Insurance Corporation, 419 U.S. 102 at 134 (1974). For the reasons discussed in part D infra, constitutional policy favors allowing this appeal. Respondent may argue in his brief, in an attempt to avoid the plain import of Tennessee v. Davis, that when Congress passed 18 U.S.C. 3731, its use of the term "United States" represented a repeal by implication of the Court made rule in Tennessee v. Davis. Such argument is not well taken. It is a cardinal rule of statutory construction that repeals by implication are not favored. Morton v. Mancari, 417 U.S. 535 at 545-550 (1974). As already noted, there is nothing

that indicates that Congress intended this result.

Furthermore, Petitioner submits that in seeking to determine Congressional intent, American history should be taken into consideration.

An enumerated grievance listed in the Declaration of Independence as being one of the "repeated injuries and usurpations, all have in direct object the establishment of absolute Tyranny over these states" was: "For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States." This was a reference to the law known as the "Act for the Impartial Administration of Justice" which passed Parliament on May 26, 1774 (14 Geo. III C. 39). This Act was in fact a "removal statute" which passed Parliament as part of British retaliation for the Boston Tea Party. This

Bill, called the "Murder Bill" in America, was among the most decried of the so-called "Intolerable Acts". When the Bill was first introduced to Parliment by Lord North, Colonel Issac Barre, the member of Parliament whose impassioned speech against the Stamp Act had provided the American radicals with the name "Sons of Liberty" charged that Lord North was proposing nothing more than a license for the army to kill Americans.[6]

6/ Authority - N. Stout, The Perfect Crisis, The Beginning Of The Revolutionary War, New York University Press, New York, 1976, p. 22-48

Friedenwald, in his work, The Declaration of Independence, An Interpretation And An Analysis, DA CAPO Press, New York, 1974, wrote in regard to this provision of the Declaration:

> "This was one of the acts repeatedly decried in the state papers of the earlier Congress, and moved Jefferson to denounce those who would submit to the enforcement of its provisions as 'cowards who would suffer a countryman to be torn

In the instant case, the same United States District Court that has so far suc-

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> from the bowels of their society, in order to be thus offered a sacrifice to parliamentary tyranny,' meriting 'that everlasting infamy now fixed on the authors of the act!' The act had been passed to provide for such contingencies as had arisen after the 'Boston Massacre' --the trial of persons accused of murder while in the discharge of their official duties. By its terms those in His Majesty's service, military as well as civil, accused of murder committed while executing the laws of the realm in Massachusetts, might obtain a change of venue to some other province, or to Great Britian, 'if it shall appear, to the satisfaction of the . . . governor, . . . that an indifferent trial cannot be had within the said province.' Provision was made also for the transportation of witnesses as well, and most grievous of all, the accused might be admitted to bail upon the order of the governor, it mattered not how flagrant the crime charged against him. As there was little likelihood that a British official, military or civil, would be brought to trial in England for committing the crime of executing

cessfully blocked this prosecution and kept Respondent MANYPENNY from as yet spending a single day in jail, expressed on the record his concern that this state prosecution might hurt morale among federal law enforcement agents.[7] The instant case represents a reversion to the state of affairs the Founding Fathers thought they had eliminated after they won the Revolutionary War and enacted the Tenth Amendment.[8]

> the law in America, this was regarded as a unwarrantable invasion of colonial rights."

The history surrounding the "Murder Bill" is discussed at length on pages 95-96, infra.

7/ See transcript of August 30, 1976 page 9 reproduced in Petition For Cert., footnote 5 at pages 42-43.

8/ The United States Government apparently has failed to take effective measures to

The instant case is also a classic example of what this Court said Congress was concerned with when it passed the predecessor to 18 U.S.C. 3731. See United States v. Sisson, supra.

In the absence of any evidence, this Court should not assume that the elected representatives of the people who make up the Congress intended to reduce the very states they represented to the status of the colonies on the eve of the American Revolution, by allowing unelected[9] federal judges to have the unreviewable power to defeat any state prosecution involving a federal officer.

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contol violence by members of its Border Patrol, which is a division of the United States Department of Justice. See "Violence, Often Unchecked, Pervades U.S. Border Patrol." New York Times, January 14, 1980.

9/ Indeed, another serious bone of contention between the colonists and England

C. 28 U.S.C. 1291 PROVIDES FOR REVIEW OF "ALL FINAL DECISIONS OF THE DISTRICT COURTS OF THE UNITED STATES . . ."; IT PROVIDES A SECOND JURISDICTIONAL BASIS FOR THIS APPEAL

Assuming arguendo that this Court agrees with the majority's literal interpretation of 18 U.S.C. 3731, then this

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was that Colonial judges were no longer subject to influence or control by the Colonists since "He has made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries." Declaration of Independence, supra. The Founding Fathers sought to eliminate the danger of the judiciary being unduly influenced by the other branches of government by providing in Article III, Section I of our Constitution that federal judges shall serve for life and cannot have their salaries reduced during their tenure in office. See, O'Donoghue v. United States, 289 U.S. 516 at 531. 28 U.S.C. 1291 and 18 U.S.C. 3731 are unequivocal expressions of Congressional intent that the independence granted the federal judiciary is not a grant of independence to any one judge to be a power unto himself, answerable to no one and free to ignore both the law and his own lack of jurisdiction.

In Arizona by contrast, judges are subject to recall by voters (Arizona Constitution, Article VIII, Part 1, Section 1);

Court should also read 28 U.S.C. 1291 literally. 28 U.S.C. 1291 reads in relevant part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . ."

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they may also be removed by impeachment (Arizona Constitution, Article VIII, Part 2, Section 1). Judges have to face the electorate every four years (Article VI, Section 12 of the Arizona Constitution, as amended) when the electorate votes as to whether the judge shall remain in office (Article VI, Section 38, as amended of the Arizona Constitution). Judges may not comment on the evidence at a trial in Arizona (Article VI, Section 27, as amended of the Arizona Constitution). Moreover, the prosecution as well as the defense may preclude a judge from hearing a case simply by filing an affidavit; no cause need be given (Arizona Rule of Criminal Procedure 10.2 found in Volume 17, Arizona Revised Statutes). All the foregoing serve, along with full appellate review, to restrain a judge from granting a judgment of acquittal in Arizona where the evidence does not justify it. None of the foregoing "political" restraints exist in the Federal system. Therefore, Petitioner submits that even if Arizona law did not provide for appellate review in these circumstances, Arizona and any other state government in a removal prosecution should be accorded the same right to appeal that Congress felt the United States Government needed.

Judge Kennedy's dissent (Pet.App. 18a-22a) found that 28 U.S.C. 1291 provided an alternative jurisdictional basis for the Court of Appeals to hear the state's appeal. The majority in the Court of Appeals held this language inapplicable to this case, stating: "A statute expressly giving the state a right to appeal in a criminal case is required." (Pet.App. 13a, footnote 3) (Emphasis in original)

The majority based its decision on United States v. Sanges, 144 U.S. 310 (1892). The Sanges Court, after surveying the law in various jurisdictions in the United States and at Common Law, concluded that since appeals in criminal cases by the government were historically disfavored, this Court would not permit the "United States" to appeal an order in favor of a defendant until such appeal was expressly authorized by Congress:

> "In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." 144 U.S. at 323 (Emphasis added)

Congressional efforts to pass such a statute began immediately after the Sanges decision was promulgated, culminating in the passage of The Criminal Appeals Act Of 1907. See, United States v. Sisson, supra, 399 U.S. at 293-6. And, as noted in United States v. Wilson, supra, the current version of 18 U.S.C. 3731 allows appeals by the government whenever the Constitution will permit them.

The Sanges Rule applied only to prosecutions by the United States Government.[10]

Allowing a state government the right to appeal in a removal prosecution would be neither a "serious" nor a "far-reaching innovation in the criminal jurisprudence of the United States". It would be completely consistent with contemporary jurisprudence in the Federal Court system, Arizona's Court system, and the courts of the overwhelming

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10/ Each state has been free to adopt or reject this rule. It is not clear whether all states even adopted the rule. See, State v. Lee, 64 Conn. 265, 30, A. 1110 (1894). Indeed, it was not until 1969 in Benton v. Maryland, 395 U.S. 784, that the Court even held that the Fifth Amendment's double jeopardy prohibition applied to the states through the Fourteenth Amendment. See, Criminal Appellate Procedure - Conflict of Laws - State Right to Appeal in Criminal Case Removed to Federal Court, B.Y.U.L. Rev. 1979, p. 1006, footnote 33 at 1011. The above cited law review article discusses the instant case and is highly critical of the majority opinion.

majority of the 50 states.[11] Petitioner submits that the majority decision, which relegates a state government to the status of a mendicant in a removal prosecution, is in fact a serious and far-reaching innovation which should not be presumed absent an express declaration of Congressional intent.

Moreover, in Sanges, the United States was seeking to invoke the court's jurisdiction under:

11/ Today only Texas, Georgia, and Nevada have no right of appeal in criminal cases from an adverse judgment; conversely, three states, Connecticut, Vermont, and Wisconsin, have a right of appeal equal to defendant's. Between these extremes are jurisdictions which recognize by statute the State's right of appeal from pretrial motions and on questions of law.

Note, Limited Right of Appeal for the State, 14 Hous.L.Rev. 735, 737 (1977).

> ". . .that provision of the Judiciary Act of 1891, by which 'appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court' 'in any case that involves the construction or application of the Constitution of the United States.' Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 838." 144 U.S. at

By contrast the language of 28 U.S.C. 1291 "all final decisions" is non-technical and far broader.

> "It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." United States v. Apfelbaum, No. 78-972, Opinion issued March 5, 1980. See also, Lewis v. United States, No. 78-1595, Opinion issued February 27, 1980.

Nothing in the legislative history indicates any intention on the part of Congress to forbid a state from using the unequivocal language of 28 U.S.C. 1291 to exercise its right of appeal in a removed criminal prosecution.[12]

12/ The Solicitor General pointed out in his Amicus Brief (footnote 6 on p. 5) that states have regularly been using the broad language of 28 U.S.C. 1291 as the jurisdictional basis for obtaining review in the Federal Court of Appeals from adverse decisions by Federal District Courts in cases arising under 28 U.S.C. 2254. 28 U.S.C. 2254 provides for Habeas Corpus relief for persons in state custody "only on the grounds that he is in custody in violation of the constitution or laws or treaties of the United States." A state prisoner may not even seek such relief until he or she has exhausted all remedies open to them under state law. This doctrine was first announced in Ex Parte Royall, 117 U.S. 241 (1886) and codified in 1948 in 28 U.S.C. 2254 (c). It was explained by this Court in Preiser v. Rodriguez, 411 U.S. 475 (1973):

> "The rule of exhaustion in federal habeaus corpus actions is rooted in considerations of federal-state comity. That principle was defined in Younger v. Harris, 401 U.S. 37, 44 27 L.Ed.2d 669, 91 S.Ct.

Congressional policy is not adverse to allowing state governments the right to appeal decisions favorable to criminal defendants in Federal Courts. State governments are authorized by statute to petition this Court for review of decisions in favor of state criminal defendants by the highest court of their own state (28 U.S.C. 1257); and may petition this Court for review where a Federal Appeals Court has rendered a decision in favor of a state criminal defendant (28 U.S.C. 1254 (1)).

Petitioner is in full agreement with the Solicitor General when he stated:

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746 (1971), as 'a proper respect for state functions,'. . ." 411 U.S. at 491.

Why the Sanges Rule is offended by an appeal in this case pursuant to 28 U.S.C. 1291, where Respondent has yet to spend one day in jail, but is not offended by a state government appeal from a Federal District Court ruling in favor of a defendant who has already spent years in prison while exhausting his remedies in state court, is not discussed by the majority.

> "If the meaning of 'United States' in Sanges is stretched to include individual states, however, then 'United States' in Section 3731 should be given the same construction, and Section 3731 should be held to authorize the appeal here." (Amicus Brief, p. 9, supra)

In a similar vein, in Willingham v. Morgan, 395 U.S. 402 (1969), this Court stated:

> ". . . Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." 395 U.S. at 407.

Petitioner submits the Congressional policy behind 18 U.S.C. 3731 and 28 U.S.C. 1291 should not be frustrated by a narrow grudging interpretation of its operation within the removal context.

D. FEDERALISM CONSIDERATIONS AND THE TENTH AMENDMENT IMPELS THIS COURT TO CONSTRUE 18 U.S.C. 3731 OR 28 U.S.C. 1291 AS ALLOWING THE STATE THE RIGHT TO APPEAL; OTHERWISE 28 U.S.C. 1442(a)(1) AND 18 U.S.C. 3731 ARE VULNERABLE TO CONSTITUTIONAL ATTACK

In Marbury v. Madison, 1 Cranch 137 (1803), this Court ruled that ". . . a law repugnant to the Constitution is void."

In N.L.R.B. v. Catholic Bishop of Chicago, 99 S.Ct. 1313 (1979), Chief Justice Burger wrote:

> "In a number of cases the Court has heeded the essence of Chief Justice Marshall's admonition in The Charming Betsy, 2 Cranch (6 U.S.) 64, 118, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." 99 S.Ct. at 1318.

See also, United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 at 571 (1973); and United States v. Vuitch, 402 U.S. 62, 70 (1971).

Petitioner contends that if the removal statute is allowed to operate in a manner that gives Federal District Judges unreviewable discretion[13] to block any state criminal prosecution involving federal officers, then the removal statute is unconstitutional as repugnant to the Tenth Amendment and Federalism. As will be discussed infra, the constitutionality of 18 U.S.C. 3731 would also be subject to constitutional attack on Fifth Amendment Equal Protection grounds if the majority

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13/ "Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." Douglas, J. dissenting in United States v. Wunderlich, 342 U.S. 98, 101 (1951).

opinion's construction of 18 U.S.C. 3731 is not reversed.[14]

The Tenth Amendment reads in its entirety:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

14/ This Court has stated:

> "'[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. Scales v. United States, supra, 367 U.S. at 211." Quoted in Aptheker v. Secretary of State, 378 U.S. 500 at 515 (1964).

For the reasons already set forth in Arguments B and C, supra, one could hardly characterize the construction of 18 U.S.C. 3731 or 28 U.S.C. 1291 as providing for appellate review in the instant case, as "perverting the purpose of a statute."

In Kessler v. Department of Public Safety, 369 U.S. 153 (1962), this Court wrote:

> "Yet the statute was upheld. Why? Because the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article 6," 369 U.S. at 172.

See also, Patterson v. New York, 432 U.S. 197 at 201-202 (1978).

In Younger v. Harris, 401 U.S. 37, this Court stated:

> "Since the beginning of this country's history Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43.

See also, Samuels v. Mackell, 401 U.S. 66

(1971); and Huffman v. Pursue, Ltd., 420 U.S. 592, 600 (1975).[15]

That Congress should have manifested this desire should come as no surprise in light of the history set forth in footnote 6, supra.

In National League of Cities v. Usery, 426 U.S. 833 (1976), this Court ruled that state sovereignty and Federalism

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15/ In Younger v. Harris, and in cases arising under 28 U.S.C. 2254, the Federal Courts have to balance the fact that a person may be subject to prosecution or be in custody in violation of an explicit federal constitutional right, versus the possible interference with a state criminal prosecution. Nonetheless, this Court in Younger v. Harris, and Congress by codifying the rule in Ex Parte Royall, supra have both decided that the balance must tip towards respect for state sovereignty. In the instant case, in sharp contrast, there is nothing to counterbalance the state's Tenth Amendment rights. There is simply no constitutional or statutory right to enjoy blatant judicial errors committed in one's behalf, free from review. Therefore, the scales must tip in favor of state's rights on this issue.

considerations precluded Congress from applying minimum wage legislation to state governments:

> "[5] This Court has never doubted that there are limits upon the power of Congress to override state sovereignty. . . In Wirtz, for example, the Court took care to assure the appellants that it had 'ample power to prevent. . . "the utter destruction of the State as a sovereign political entity,"' which they feared. 392 U.S. at 196, 20 L.Ed.2d 1020, 88 S.Ct. 2017.
>
> * * *
>
> In Fry, supra, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:
>
> 'While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," United States v. Darby, 312 U.S. 100, 124, [85 L.Ed. 609, 61 S.Ct. 451, 132 A.L.R. 1430] (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity

> or their ability to function effectively in a federal system.' 421 U.S. at 547 n 7, 44 L.Ed.2d 363, 95 S.Ct. 1792.
>
> * * *
>
> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislature authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 842-845.

Petitioner is not asserting that 28 U.S.C. 1442(a)(1) is unconstitutional per se. This Court's prior decisions traced the history of the removal statute and recognized its importance in effectuating the mandate of the Supremacy Clause. Willingham v. Morgan, supra, 395 U.S. at 405-406.

Petitioner does contend that if, as the majority held, Congress did not intend to allow the states the right to appeal in a removal

prosecution, then 28 U.S.C. 1442(a)(1) becomes unconstitutional as applied, because of "overbreadth" problems.[16]

16/ In N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964), this Court stated:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See id., at 463-464. '. . . [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' Cantwell v. Connecticut, 310 U.S. 296, 304, 84 L ed 1213, 1218 60 S.Ct. 900, 128 ALR 1352. '. . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 US 479, 488, 5 L ed 2d 231, 237, 81 S Ct 247." 377 U.S. at 307-308.

Petitioner's counsel is aware that the "overbreadth" doctrine has traditionally been applied by this Court when the freedom encroached upon by a statute was protected by the First Amendment. Petitioner submits there is no analytical reason why the same approach should not be applied when the protected freedom encroached upon is the Tenth Amendment freedom of the states to enforce state criminal statutes to protect the life and limb of their residents.[17] This Court recognized ". . . the more compelling state interest in conducting criminal trials in the state courts" in Willingham v. Morgan, supra, 395 U.S. at 409, footnote 4.

17/ The protection of life and limb is even more important in our Constitutional scheme than is the protection of free speech. When speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" speech may be restricted by a state. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

The purposes the removal statute are suppose to serve are in no way furthered by according removal defendants the special privilege of having judicial errors committed in their favor insulated from review. That is an overly-broad windfall benefit that seriously encroaches on state sovereignty. The removal statute was designed to effectuate the supremacy of the Federal Government by protecting persons acting under color of federal law from state prosecutions for acts performed within the proper scope of their federal authority; Tennessee v. Davis, supra; Colorado v. Symes, 286 U.S. 510 at 517 (1932). It also serves to provide a forum for a defense based on official immunity, free from local bias. Willingham v. Morgan, 395 U.S. 402 at 407 (1969). The statute should not operate to stack the deck against the state government and in favor of the removal defendant.

As this Court stated in Colorado v. Symes, supra:

> "And it is axiomatic that the right of the States consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law." (Emphasis added) 286 U.S. at 518. See also, State of North Carolina v. Carr, 386 F.2d 129 at 131 (1967).

The removal statute as construed by the majority has the same defect as statutes subject to attack on First Amendment overbreadth grounds.

18 U.S.C. 3731 will also be vulnerable to future constitutional attack on

Fifth Amendment Equal Protection grounds if the majority decision is not reversed.

The majority has ruled that Congress created two distinct classes of criminal defendants in Federal Court: (1) the ordinary federal defendant, who is subject to an appeal by the prosecution pursuant to 18 U.S.C. 3731 to challenge erroneous rulings in favor of the defendant by the District Court; and (2) federal employees entitled to removal under 28 U.S.C. 1442 (a)(1) who now constitute a special privileged class. Congress cannot set up such a statutory scheme consistent with the Equal Protection guarantee that is embodied in the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 491, (1954); c.f., Marshall v. United States, 414 U.S. 417 (1974).

Unless someone can think up a "rational basis" for allowing criminals

who are employed by the Federal Government these special privileges, the Equal Protection rights of the ordinary federal defendant[18] are violated every time the United States Government files an appeal under 18 U.S.C. 3731. Even if some ingenious Justice Department attorney can ascribe some rational basis for sustaining this distinction, this Court should not sustain the majority's Orwellian corruption of one of our oldest and most basic legal principles.[19]

18/ The instant Petitioner obviously lacks standing to bring such an attack on 18 U.S.C. 3731. Numerous inmates in federal prisons and future federal defendants do and will have standing to make such an attack.

19/ In George Orwell's Animal Farm, Harcourt, Brace and Jovanovich, New York, 1946, the Seventh Commandment "All Animals Are Equal" (p. 33) is ultimately altered by the new ruling class to read: "All Animals

Therefore, in order to forestall a potential constitutional attack on these two important statutes, the Court should construe 18 U.S.C. 3731 or 28 U.S.C. 1291 as allowing a state to appeal in a removal prosecution.

Are Equal But Some Are More Equal Than Others" (p. 123). The concept of equal justice under law, inscribed over the entrance to this Court, dates back at least to the time of Moses. See, Exodus 12 § 49 and Numbers 15 § 15-16.

(Parenthetically, Mosaic law also provided for appeals to higher courts. See, Deuteronomy 17 § 8-13).

Petitioner submits that when this Court is trying to ascertain the Congressional intent behind 18 U.S.C. 3731, the Court should not assume that Congress intended to violate this most basic precept of Western law.

E. 28 U.S.C. 1651 PROVIDES THE COURT OF APPEALS WITH JURISDICTION TO CONSIDER PETITIONER'S CONTENTION THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SUA SPONTE ENTER A JUDGMENT OF ACQUITTAL ELEVEN MONTHS AFTER THE JURY FOUND RESPONDENT GUILTY

Judge Kennedy, in his dissent noted:

> "I turn now to the merits of the district court's ruling. As an initial matter, the State argues that the judge lacked jurisdiction to enter a judgment of acquittal because, contrary to the requirements of rule 29(c), the defendant failed to file a proper motion within seven days of the verdict. At least two circuits have held that unless a timely motion is filed, the judge lacks jurisdiction to enter a judgment of acquittal." (Citations omitted) Pet.App. at 30a.

This issue is discussed fully in part II of this brief.

The majority opinion never discussed this contention of the Petitioner since they found they were "without jurisdiction to entertain this appeal" (Pet. App. at 11a). The Petitioner did not formally request the Court of Appeals to issue a Writ of Mandamus, it being the position of the Petitioner in this Court and in the Court of Appeals that the Petitioner has the right to a full appeal,[19a] challenging the merits

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19a/ Petitioner concedes that the weight of authority is that Mandamus does not lie as a substitute for an appeal, and that Mandamus would not be the proper procedural device for challenging the merits, as opposed to the jurisdiction of the District Court's order acquitting Respondent. Will v. United States, 389 U.S. 90 at 96-97 (1967). The Will Court went on to say, however:

> "This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution. Ex parte United

of the District Court's order granting the Judgment Of Acquittal, as well as challenging the District Court's jurisdiction to even enter such order.

The Court of Appeals, and this Court have jurisdiction to consider the issue discussed in part II infra by construing the Petitioner's appeal as a Petition for a Writ of Mandamus pursuant to 28 U.S.C. 1651. It is the substance, and not the label of pleadings that are controlling. Hill v. United States, 368 U.S. 424 at 430 (1962); Martenay v. United States,

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States, 287 U.S. 241 (1932), and where the Court overreached its judicial power to deny the Government the rightful fruits of a valid conviction, Ex parte United States, 242 U.S. 27 (1916)." (Emphasis added) 389 U.S. at 97-98.

216 F.2d 760 at 762 (1954); Scarponi v. United States, 313 F.2d 950 at 952 (1963); United States v. Rosenson, 291 F.Supp. 867 at 869 (1968).

In United States v. Denson, 603 F.2d 1143 (1979), the En Banc Fifth Circuit held that:

> ". . . we hold that when the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." 603 F.2d at 1145.[20]

In Maryland v. Soper, (No. 1) 270 U.S. 9 (1925), this Court stated:

20/ United States v. Denson, discusses and reviews at length many of this Court's prior decisions in respect to the use of Mandamus in arriving at its holding.

> "In respect of the removal of state prosecutions, there should be a more liberal use of mandamus than in a removal of civil cases. . ." 270 U.S. at 29.

See also, United States v. Smith, 331 U.S. 469 (1947) where this Court issued a Writ of Mandamus to vacate a trial court's untimely grant of a new trial when the trial court had no jurisdiction to do so under Rule 33; United States v. Weinstein, 452 F.2d 704 (1971).

Petitioner submits that even if this Court agrees with the majority that a state government has no right to appeal in a removal prosecution, for the reasons set forth in part II of this brief, the District Court had no lawful authority to enter the Judgment Of Acquittal and "over-reached its judicial power to deny the

Government the rightful fruits of a valid conviction." Will v. United States, supra.

Therefore, even if the Petitioner is held to have no right to a formal appeal, the Court of Appeals should have, and this Court should now exercise its Mandamus jurisdiction and its duty to supervise the actions of the lower court by setting aside the Judgment Of Acquittal and ordering the District Court to reinstate the verdict. La Buy v. Howes Leather Company, 352 U.S. 259 at 259-260 (1957).

II.

THE DISTRICT COURT HAD NO JURISDICTION TO SUA SPONTE ORDER A JUDGMENT OF ACQUITTAL ELEVEN MONTHS AFTER A JURY CONVICTED RESPONDENT

Rule 29(c) of the Federal Rules of Criminal Procedure allows a defendant to make a Judgment Of Acquittal motion within seven days after the jury is discharged or within such further time as the Court may fix during the seven day period. Every lower Federal Court that has considered this issue has held that unless a timely motion is filed or extension of time is granted within the seven day limit, the District Court loses jurisdiction to consider such motion.[22]

22/ United States v. Johnson, 487 F.2d 1316 at 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974); Rowlette v. United States, 392 F.2d 437 at 439 (10th Cir. 1968); United States v. Beran, 546 F.2d 1316 (10th Cir. 1976), cert. denied, 430 U.S. 916; United States v. Homer, 411 F.Supp. 972 at 975,

In the instant case, Respondent was convicted by a jury on November 6, 1976. Respondent did file a timely Motion For A New Trial pursuant to Rule 33 and a timely Motion For Arrest Of Judgment pursuant to Rule 34. Respondent moved for a Judgment Of Acquittal after the close of the state's case (Tr. 132-3); and after the close of all the evidence (Tr. 348). Both motions were denied at that time by the District Court (Tr. 133 and minute entry of November 5, 1976, document 19 of the record on appeal). Respondent never filed a Motion For Judgment Of Acquittal pursuant to Rule 29(c) after the guilty verdict was returned, and never requested an extension of time to file such motion. Neither of Respondent's post-trial motions alleged insufficiency of the

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affirmed on other grounds, 545 F.2d 864 (3rd Cir. 1976), cert. denied, 431 U.S. 954 (1977); United States v. Laurelli, 187 F.Supp. 30; United States v. Kane, 319 F.Supp. 527.

evidence as a ground for granting said motion.[23]

The District Court granted Respondent's Motion For Arrest Of Judgment on November 30, 1976, 24 days after the jury's verdict.[24] On December 6, 1976, the

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23/ Respondent's new trial motion filed November 15, 1976, was based on the alleged failure of the prosecution to disclose a statement of Respondent's that was used against him at trial and also on the ground that the Court should not have instructed the jury that a loaded gun is a deadly weapon as a matter of law. Respondent's Motion For Arrest Of Judgment was also filed November 15, 1976 and was based on Respondent's theory that the State of Arizona lacked jurisdiction to prosecute him in the first instance. This was discussed at length in the District Court's opinion (Pet.App. at 41a-50a). Both of Respondent's motions are reproduced in the Appendix at pages 5 through 16.

24/ Thus Respondent's failure to file a timely Rule 29(c) motion cannot be ascribed to Respondent's detrimental reliance on the District Court having obviated the need for such motion by granting the Respondent's Motion For Arrest Of Judgment.

District Court granted the Petitioner's Motion For Reconsideration of its ruling Arresting Judgment. Nothing further happened on the case until Repondent filed a Motion For A Status Hearing, which was held on September 26, 1977. It is noteworthy that the record of this Status Hearing does not reflect any mention by either Respondent's counsel or by the District Court that a Judgment Of Acquittal was requested by Respondent, or even within the Court's contemplation at this time. In fact, the Court stated: "I don't feel there is any need for additional briefing. . ." (Transcript of September 26, p. page 4). No transcripts of Respondent's trial were in existence at this time. The District Court's decision was based on the District Court's eleven month old and completely erroneous recollection of what had occurred at trial.[25]

25/ As Judge Kennedy, the only Judge who reached the merits of the Petitioner

The District Court, under the erroneous belief it had failed to properly

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appeal noted in his dissent:

> "The court's ruling was based on the premise that the evidence was insufficient to overcome a defense of immunity under Clifton v. Cox, supra. The defense of immunity was not raised or argued at all at trial. The defendant had the burden of raising immunity as an affirmative defense but did not do that.
>
> In these circumstances the government cannot be faulted for failing to prove that grounds for immunity were not present. It makes no sense to apply a test of insufficiency of the evidence to a defense not raised at trial and pertaining to a subject that the Government did not have the duty to open." (Pet.App. 31a-32a)

Judge Kennedy went on to point out that even if Respondent had formally raised the defense of immunity at trial, the incriminating evidence introduced by the State at trial was sufficient to overcome such defense, and that the Judgment Of Acquittal was improper in any event (Pet.App. 32a-34a). Indeed, the District Court's ruling on this issue takes on a truely Kafkaesque quality when one reads the following statement by Respondent's counsel (Mr. Whitney) the day

instruct the jury on the immunity defense that was never presented, attempted to justify the untimely sua sponte entry of the Judgment

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prior to trial. This was in response to the prosecutor's (Mr. Lingeman) request that potential jurors be voir dired as to their feeling about a possible immunity defense:

> "MR. WHITNEY: If it please the Court, I would like, while we're here and Mr. Lingeman is here, Mr. Lingeman has indicated to me that he will ask the jury concerning the question of whether or not they feel one apprehending a misdemeanant has the right, as an officer, to commit an assault. Our position in this trial, Your Honor, is that no assault was intended, and we will not intend to use that as a defense. Our position will be that there was in fact an accident and we will offer testimony to that effect. (Transcript of Motion To Dismiss, November 3, 1976, p. 18)

Respondent never requested a jury instruction on any type of immunity defense. (Document 16 of the record on appeal, Respondent-Defendant MANYPENNY'S Requested Jury Instruction, filed November 3, 1976; and see Trial Transcript p. 346.

Of Acquittal by stating: ". . . this Court will consider the motion for arrest of judgment as a motion under Rule 29(c) for judgment of acquittal." (Pet.App. 56a)

The sole ground for granting a Judgment Of Acquittal is the insufficiency of the Government's case. United States v. Cohen, 445 F.Supp. 843, affirmed, 594 F.2d 855, cert. denied, 99 S.Ct. 2169. An error in instructing the jury is not a ground for granting a Judgment Of Acquittal. United States v. Rivers, 406 F.Supp. 709, affirmed at 544 F.2d 513.

As noted in Argument E, supra on issue I, it is the substance and not the form of the pleadings that are controlling. If Respondent's timely Motion For Arrest Of Judgment or Respondent's timely new trial motion had attacked the sufficiency

of the evidence presented in the State's case, the District Court could have properly construed those motions as a Rule 29(c) motion and would have had jurisdiction to have granted said motion.[26] United States v. Forrest, 434 F.Supp. 1131, affirmed, 573 F.2d 1302; United States v. Gibbons, 437 F.Supp. 650, affirmed, 588 F.2d 824; United States v. Beran, supra, 546 F.2d 1316. As already noted, the sufficiency of the evidence of the State's case was not attacked or alleged in either post trial motion.

In United States v. Smith, supra, 331 U.S. 469 (1947), the defendant had filed a timely motion for new trial pursuant

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26/ The granting of said motion would still have been error on this record as Judge Kennedy noted. The substantive merits, or lack thereof of the District Court's order are not before this Court and will not be argued by Petitioner.

to Rule 33. The District Court denied the defendant's motion and after the defendant's conviction was affirmed by an Appeals Court, the Federal District Court sua sponte ordered a new trial. This Court held the time limit set forth in the Rules was jurisdictional, and granted the Government's Petition For Writ Of Mandamus to vacate the new trial order.[27]

27/ This Court stated per Justice Jackson:

> "Briefly, Judge Smith thought and intervenor argues that the rule prevents a defendant from asking the court to grant a new trial after the times specified, but that it permits the judge to order retrial without request and at any time. The result, in view of annulment of the term limitation, would be that the power of the trial court to grant new trials on its own motions lingers on indefinately. There are several reasons why this construction of the Rules is not acceptable.

Assuming arguendo this Court views the reference to the Rules in Smith as dicta

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* * *

> We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative.
>
> * * *
>
> But the extension of that time indefinately is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." 331 U.S. at 473-476. (Emphasis added)

Smith is distinguishable from the instant case in that the defendant in the Smith case already had his conviction affirmed

rather than holding as to Rule 29(c) motions, Petitioner submits the Smith Rule should be extended to Rule 29(c) motions.

Rule 29(a) mandates[28] that the court enter a Judgment Of Acquittal on

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by an Appeals Court prior to the entry of the new trial order. In the instant case, jurisdiction had not shifted to the Court of Appeals at the time the District Court entered the untimely Judgment Of Acquittal. That factor was considered and discussed by the Court in reaching its decision in Smith. Nonetheless, Petitioner submits that the reasoning advanced in the quoted portion of the Smith case is equally applicable to the instant case.

28/ Rule 29(a) which controls Motions For Judgments Of Acquittal prior to submission of the case to the jury, reads in relevant part:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." (Emphasis added)

its own motion or on motion of a defendant if the evidence is insufficient to sustain a conviction. If the rule is followed and properly applied, there is no need to allow a District Court the power to enter a Judgment Of Acquittal months down the line. In the rare case where a Court believes it has made a mistake in failing to grant the Judgment Of Acquittal, and the seven days time limit has expired, the District Court can do justice by granting the defendant a stay of imprisonment pending appeal pursuant to Rule 38 of the Federal Rules

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By contrast, Rule 29(c) which controls Judgment Of Acquittal Motions made after submission of the case to the jury, does not use mandatory language and does not speak to the Court's power to enter such motion sua sponte as does Rule 29(a):

> "If a verdict of guilty is rendered the court may on such motion set aside the verdict and enter judgment of acquittal." (Emphasis added)

of Criminal Procedure. If the reviewing court, after reading the transcripts, agrees that the evidence was insufficient as a matter of law, then the Appellate Court can reverse the defendant's conviction and direct that a Judgment Of Acquittal be entered.[29] When, as here, the District Court is reviewing a jury's verdict, the District Court sits as a reviewing court, not as the finder of fact. The standard of review to be applied by the Federal District Court and Federal Appeals Court is identical when the jury is the fact-finder. Burks v. United States, 437 U.S. 1 at 16-17 (1978); Jackson v.

29/ If a reviewing court determines that the evidence introduced at trial was insufficient, the proper remedy is the entry of a Judgment Of Acquittal and not a remand for a new trial. The double jeopardy clause precludes a new trial when reversal is predicated on insufficient evidence. Burks v. United States, 437 U.S. 1 (1978).

Virginia, 61 L.Ed. 560 at 573 (1979); United States v. Anderson, 532 F.2d 1218 at 1223 (1976). Therefore, a defendant is not subjected to a more stringent standard of review if an Appeals Court passes on his sufficiency of the evidence claim.[30] Furthermore, assuming that the defendant did not timely file an appeal or failed to raise the issue of sufficiency of evidence on appeal, a federal prisoner could still obtain the same relief by filing a Petition For Writ Of Habeas Corpus pursuant to 28 U.S.C. 2241.

30/ This is in sharp contrast to the Rule 33 Motion before the Court in the Smith case. The scope of appellate review from the denial of a new trial motion is narrow. The denial of a motion for a new trial will not be reversed on appeal absent an abuse of discretion by the District Court. United States v. Hamilton, 559 F.2d 1370; United States v. Granger, 504 F.2d 585; Osborne v. United States, 351 F.2d 111; United States v. Carlson, 423 F.2d 431, cert.denied, 400 847; United States v. Wade, 467 F.2d 1226, cert.denied, 410 U.S. 933.

Therefore, by adopting the holding of the Fifth and Tenth Circuits on this issue, the Court would not bar anyone, including the instant Respondent, from obtaining appropriate relief. The Court will assure that in the future "the uncertainty and dimness of things long past" (Smith, supra, 331 U.S. at 276) do not result in erroneous rulings. Rule 29(c) does not allow, and should not allow, a court to review the sufficiency of the evidence in a trial that took place eleven months previous, without the benefit of a set of transcripts.[31]

31/ "The palest ink is a more reliable record than the best memory." - Oriental proverb. Transcripts are necessary to adequate appellate review. See, Griffin v. Illinois, 351 U.S. 12 (1956). As noted supra, the same District Court that entered this Judgment Of Acquittal sua sponte denied two motions for Judgment Of Acquittal during trial when the evidence was fresh in his mind.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the guilty verdict should be reinstated.

Respectfully submitted this 23rd day of May, 1980.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By Daniel Jesse Smith
DANIEL JESSE SMITH
Chief Deputy Pima County Attorney
Appellate Division

HISTORY OF "THE ACT FOR THE IMPARTIAL ADMINISTRATION OF JUSTICE"

British anger at the Boston Tea Party resulted in a series of acts being introduced into Parliament by the British Cabinet. On March 14, 1774, Lord North introduced the first of these, the Boston Port Bill, which passed Commons March 24, 1774 and Lords March 30, 1774 and was signed into law on March 31 by King George, III, closing the Port of Boston.

The Port Act was followed rapidly by the Massachusetts Government Act, designed to "take the executive power from the hands of the democratic part of Government", according to Lord North, because there was "too much democracy in Massachusetts". On the same day that Lord North presented the Government Act, he moved, in a voice that "trembled and faltered at every word", for permission to bring in a "Bill for the Impartial Administration of Justice" in Massachusetts. 14 Geo. III Ch. 39 (1774).

The Bill introduced into Parliament was, like the Quartering Act introduced the same day, the result of the appointment of General Thomas Gage as governor of Massachusetts. Gage was of the opinion that it was hard for British soldiers to get justice from Massachusetts juries and magistrates. Although he could cite no precedent, and despite the fact that all the British troops tried for their part in the Boston Massacre were acquitted by a Boston jury, Gage contended that soldiers doing their duty in suppressing a riot would be in very great danger of being

charged with a capitol crime and hanged by a Massachusetts court. Lord North responded to this contention with the "Bill for the Impartial Administration of Justice". Introduction of this Bill into the same Parliament which had passed, without division the Port Act, touched off instant and vehement debate.

When Lord North finally brought in the Justice Bill, there was a bare quorum in Parliament. John Sawbridge accused Lord North of a cowardly attempt to enslave America by sneaking the Bill before a thin House. Nonetheless, the Bill went through its reading and overwhelmingly passed Commons on May 6, 1774. The Bill passed the House of Lords with little more difficulty May 18, although eight persons signed a protest against it. It was signed into law along with the Government Act.

The "murder act" quickly became one of the most decried of the "intolerable acts" by which the British government attempted to suppress the growing revolutionary sentiment in America. Along with the Quartering Act and the Government Act, the Justice Act was denounced repeatedly in the tracts and broadsides of the period, and was bitterly criticized in the Declaration and Resolves issued by the Virginia Convention and Declaration and Resolves of both the First and Second Continental Congress.

Authority - N. Stout, The Perfect Crisis, The Beginning Of The Revolutionary War, New York University Press, New York, 1976, P. 22-48

respondent's

brief

79-621

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THE NINTH CIRCUIT

BRIEF FOR WILLIAM DALE MANYPENNY

JAMES D. WHITNEY
AUBREY R. WILLIAMS
655 N. Alvernon, Suite 219
Tucson, Arizona 85711
Attorneys for Respondent

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AUBREY R. WILLIAMS
655 N. Alvernon, Suite 219
Tucson, Arizona 85711
Attorneys for Respondent

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A. WHERE A JURISDICTIONAL DEFECT IS NOT APPARENT ON THE RECORD, A MOTION FOR JUDGMENT OF ACQUITTAL IS THE PROPER METHOD OF TESTING THE JURISDICTIONAL DEFECT, NOT A MOTION IN ARREST OF JUDGMENT. THE COURT WILL LOOK TO FORM NOT SUBSTANCE . . 59

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STATEMENT

Although the Petitioner would persuade this Court that the principal question is legal and deals with the Petitioner's right of appeal under U.S.C. 3731, the Petitioner's Brief on the merits contains five pages of argument reciting facts favorable only to the Petitioner. Petitioner's Brief, 7-12. The recitation of the facts also conflict with the Petitioner's stance that there were two separate motions, one a Motion in Arrest of Judgment and the other raised sua sponte, A Judgment of Acquittal void because of untimeliness. Petitioner's Brief, 29 et seq.

So that this Court will understand that the Respondent too, has a cause to be stated and the essence of the Motion in Arrest of Judgment was, in fact, a Motion for Judgment of Acquittal.

The other side of the coin is:

1. The Respondent had been stationed for

almost 6 years at the time of the trial.
R. 154-155

2. He was on duty with a probationer, one Hjelle, who had not been following orders and who had been unable to follow orders and had taken action without authorization or without proper reason.
R. 155-159

3. That Respondent had gone with Hjelle at the specific request of his superior, Wilbur E. Kenney, because of Hjelle's inability to follow directions, Respondent had been specifically requested to take Mr. Hjelle on that assignment and his main duty would be to protect the trainee (Hjelle) and himself.
R. 304-305

4. Prior to the incident in question, Hjelle had lost contact with the Respondent and had wandered into camp with three aliens rather than coordinating with the Respondent to prevent any danger to himself.

R. 158-159

5. In the apprehension of the aliens out of which this incident arose, Hjelle was stationed in a position to block the aliens but heard only Spanish words for "stop" and the English words for "cut" and "Bill" (Manypenny's first name).

R. 169-170

6. When these words were spoken Manypenny believed Hjelle had been "jumped" and was in trouble.

R. 170

7. At this time, Respondent fired his shotgun into the air attempting to divert the illegal's attention.

R. 170

8. Prior to this occasion Manypenny had seen and heard of many incidents of aliens carrying knives and guns and of a person being murdered by an alien.

R. 162-166

9. In fact, knives seized from aliens by the Respondent were introduced into evidence.

R. 237-239

10. The Respondent further testified that of the approximately 5600 aliens he had apprehended, one-third or more carried some sort of knife or weapon.

R. 238

11. Respondent did not at anytime state that he was trying to kill or injure anyone but rather to apprehend them.

R. 241

12. Mr. Hjelle further testified that he did yell and did state the words as Manypenny had indicated.

R. 285

SUMMARY OF ARGUMENT

1. The State of Arizona has no right of appeal and therefore cannot be stripped of its rights in the federal judiciary system. The right of appeal is a matter of express federal statutory prerogative and has not been provided by Congress. United States v. Hines, 419 F.2d 173 (CA10-1970). The cases are clear that in the absence of this authority a right may not be created by the recitation of legislative history that was intended to liberalize federal appellate practice. State v. Manypenny, 608 F.2d 1197 (CA9-1979).

No right exists for appellate relief in the state of origin of this case and a premium should not be placed upon the right of a federal officer to exercise his rights under the removal statute. Arizona Revised Statutes, §13-1712. Nor is

there any remedy under mandamus, since such right is reserved for lack of jurisdiction or clear abuse of discretion and is not the equivalent of an appellate review of error. Ex Parte Fahey, 322 US 258 (1947).

The Courts have held by the weight of authority that the provisions of 28 USC §1291 do not encompass a right of appeal in criminal cases. U.S. v. Sanges, 144 US 310 (1892). The absence of the right of express appeal under federal statutes cannot be remedied by the expansive language of 1291 and in the absence of an express, criminal right of appeal, the party is without remedy. Government of Virgin Islands v. Hamilton, 475 F.2d 529 (CA3-1973).

The Fifth and Tenth Amendment arguments are ruses on the part of the Petitioner. The Fifth Amendment is not available to a party who stands to gain or lose nothing by a violation thereof; this should

not accept an argument in which the proponent has no standing. Fleming v. Rhodes 331 US 100 (1947). The Tenth Amendment to the United States Constitution is not available to invade the right of the federal judiciary to control its own system. Case v. Bowles, 327 US 92 (1946).

2. The Court having ruled upon motion in arrest of judgment in 1976 and having retained jurisdiction for purposes of consideration at behest of the state, retained jurisdiction for a further ruling, U.S. v. Smith, 331 US 469 (1947). If, however, the District Court lost jurisdiction of subject matter of this case, the subject matter was lost for all purposes including the court's order setting aside the arrest of judgment. This order in arrest of judgment still stands and the Court should dismiss the entire appeal as being untimely under the provisions of 18 USC §3731. The writ of mandamus is unavailable, since the Court had jurisdiction and acted well within

its discretion. See Argument 1, supra.

I

THE STATE OF ARIZONA HAS NO RIGHT OF REVIEW UNDER 18 U.S.C. 1291 OR THE EXTRAORDINARY WRITS, FEDERAL OR STATE.

The state throughout these proceedings has adamantly expressed its right to appeal under the provisions of 18 U.S.C. 3731. Its Notice of Appeal so states and this position is reiterated in the briefs and pleadings proceeding and its brief on the merits. Notice of Appeal, CR. 163. The Appellant's Reply Brief filed in the Ninth Circuit contended that it was an "erroneous contention" that the state could not avail itself of the provisions of 18 U.S.C. 3731, because although the statute spoke only of the "United States", this is not what Congress intended. Appellant's Reply Brief, 14 et seq.

The Petition for Certiorari take a similar stance, as did a Oppositive Motion to Limit Issues, Pet. 18 et seq. The Oppositive to Motion to Limit Issues states:

> Petitioner's position throughout this litigation has been and remains that the Petitioner has a right to a full-fledged appeal ... Id. 2.

The federal statute provides that the "United States" shall have a right to appeal. 18 U.S.C. 3731. The Courts have held that this provision is the only statutory right of appeal to the United States:

> Indeed, the United States is denied a right of appeal in criminal cases absent express statutory sanction. There is no express authorization in 28 U.S.C. 1291 and the government's only statutory created right of appeal in criminal cases is given by 18 U.S.C. 3731. United States v. Hines, 419 F. 2d 173, 174 (CA. 10-1970).

The statute (18 U.S.C. 3731) does not mention the "several states" or the territories or possessions. In dealing with the failure of Congress to confer a right upon the states, the Ninth Circuit, Choy, J, stated:

> ...it is manifest that Section 3731 is limited by its own terms to appeals by United States as a prosecuting entity.

> The statute authorizes "an appeal by the United States", not an appeal by a state or by "any of the United States." As we have previously stated '(t)he language of a statute is the best and most reliable index of its meaning, and when the language is clear and unequivocal it is determinative of its construction.'" State v. Manypenny, 608 F. 2d 1197, 1199 (1979).

The "United States" as defined is an entity separate and apart from the separate states:

> The term "United States" may be used in any one of several senses, either as the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations, or as designating the territory over which the sovereignty of the United States extends, or as the collective name of the states which are united by and under the United States. 77 Am. Jur. 2d, United States. 2.

The definition of "state", conversely in the criminal context almost uniformly includes the following:

> The term "state" includes the District of Columbia, the

> Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone). 18 U.S.C. 921(a)(2).

and in the removal statute:

> For purposes of this Chapter
> (1) the term "State Court" includes the Superior Court of the District of Columbia.
> (2) the term "state" includes the District of Columbia. 28 U.S.C. 1450.

In the absence of any authority that the State of Arizona can fit within the definition of "United States" for purposes of 18 U.S.C. 3731, the Petitioner state relies heavily upon the legislative history of Section 3731 and the intent in the act that the same be liberally construed to justify the implanting of a new purpose in the statute that exists only in Counsel's mind. State's Brief, 37 et seq.

It is a fundamental precept of statutory construction that legislative history will not be employed when:

> The courts may not read into a

> remedial statute something that is not within the manifest intention of the lawmaking body. A liberal construction of a remedial statute does not authorize the court to place such judicial construction upon the language used to effectuate its own conception of right, rather than the legislative intent, or to depart from the plain and obvious meaning of the language used, or to give a forced or unnatural construction thereto. 73 Am. Jur. 2d Statutes, 280.

Judge Choy, in refusing to create a right of appeal by judicial legislation as would the prosecution, stated:

> Nowhere in the legislative history of the various criminal appeals acts does it appear that Congress addressed or even considered appeals by the state in State Prosecutions before the federal courts under 1442...the reports and debates on the issue of such acts indicate that Congress was concerned only with the right of the federal government to appeal in criminal cases. State v. Manypenny, 608 F. 2d 1197, 1199(1979), footnote 4.

That the lack of an appeal may be unjust is probable, but to create from theory a non-existent statutory right is anarchy.

This Court has held that the removal and trial of federal officers is a matter of federal concern. Tennessee v. Davis, 100 U.S. 257, 25 L. Ed. 648(1879). The protection of the integrity of the general government requires that federal substantive law pertains. Id. To permit otherwise, Tennessee v. Davis holds would be be to invite an unfriendly state legislative to destroy the federal government in that area. Id. 25 L. Ed. 648, 651:

> The removal of cases arising under those laws, from State into Federal Courts, is, therefore, no invasion of state domain. On the contrary, a denial of the right of the General Government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

If the state statute were to provide for an appeal from a judgment of conviction, which it does not, this remedy would be of no avail

since the federal judicial system does not recognize any prosecutorial appeal except by the United States.

The Ninth Circuit held in this action, State v. Manypenny, supra, that the right of appeal is not determined by the existence of a remedy in the state court, since the creation of rights in the sphere of federal interests is a federal perrogative. Id. 1200. In Best v. United States, 573 F. 2d 1095 (CA. 9-1978), written by Judge Choy, the Court held that the fashioning of substantive rights in the federal judiciary was the right of Congress and state statutory remedies could not be incorporated into the federal system as in civil cases. Id. 1101.

An analogus situation arose in Government of Virgin Islands v. Hamilton, 475 F. 2d 529 (CA.3-1973). Before discussing the case it should be noted again that for purposes of

the federal judiciary, the Virgin Islands are considered a state with all the privileges and disabilities of that position:

> The territorial courts are not recognized under the judicial clause of the Constitution, but are legislative courts, and the fact that the judges of the Supreme Court of a territory are appointed by the President does not make the courts they are authorized to hold courts of the United States. 72 Am. Jur. 2d, States, Territories, and Dependencies, §159.

In Hamilton, supra, the conviction of a criminal defendant was reversed by the District Court under a specific federal statute providing for appeals from the Virgin Islands Municipal Court. Id. 530. No provision existed under federal law permitting further appeal. Id. Although the government attempted to appeal under 28 U.S.C. 1291, as in the present case, the Court held that in the absence of specific federal authority for appeal, the federal system would not

countenance a criminal appeal:

> The existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. Id.

Nowhere has the Petitioner cited any specific federal statute and in its absence, the Petitioner has no right of appeal.

The Arizona Statutes contain no provisions for appealing from a judgment of acquittal. The statutory bases contained in Arizona Revised Statutes (A.R.S.) Sections 13-1711 and 13-1712. The contents of these statutes are:

> The state, or any party to a prosecution by indictment or information, may appeal to the Court of appeals as prescribed by law and in the manner provided by the rules of criminal procedure, except criminal actions involving crimes which a sentence of death or life imprisonment has actually been imposed may only be appealed to the Supreme Court. A.R.S 13-1711.

A.R.S. 13-1712 limits the state's right of appeal. An appeal may be taken by the state from:

1. An order quashing an indictment or information or count thereof.
2. An order granting a new trial.
3. An order arresting judgment.
4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
5. An order made after judgment affecting the substantial rights of the state.
6. The sentence on the grounds that it is illegal.
7. An order granting a motion to supress the use of evidence.

None of the provisions of A.R.S. 12-1712 provides the State in this cause with an appeal right.

In the absence of such a statutory right, the Arizona Courts have held, as have the federal courts, that no right of appeal exists. State v. Fayle, 114 Ariz. 219, 560 P. 2d 113, (1976). State v. Fayle, supra, is a brief opinion, in essence, adopts the position of State v. Lopez, infra.

State of Arizona v. Lopez, infra, the Court held that an appeal from an order dismissing the prosecution of an action would not

lie. 560 P. 2d 113, 144. The Court in reviewing the dismissal distinguished between the quashing of indictment for legal insufficiency (A.R.S. 13-1712(1)) and the dismissal of a prosecution; the first testing the "basic legal sufficiency" and the latter involving a "violation of speedy trial time limits or for lack of prosecution." Id. 114-115 (Emphasis is the Court's). There being no right of appeal by statute, the appeal would not lie. Id. State v. Gasonette, 95 Ariz. 234, 388, P. 2d. 139, (1972).

> The right of an appeal in criminal cases was unknown to the common law ...It is purely statutory and does not exist in absence of statute... There is no provision either in Arizona's Constitution, by statute or criminal rule which permits an appeal to the Superior Court or to this Court from a denial of a Motion to Dismiss a Criminal Complaint. State v. Whitney, 496 P. 2d. 138-139.

Therefore, in the absence of State statutory or constitutional authority or criminal rule, the State would have no

authority to appeal if a judgment of acquittal had been entered and the case had remained in State Court.

The State obtains no greater right of appeal by reason of the Defendant's removal; if no statutory right exists under State law, none is acquired by removal:

> Removal gives the federal court only derivative jurisdiction. This is no better than that possessed by the state court in which the action was commenced. Thus, if jurisdiction is lacking in the state court in the first instance, it is not brought into being by the removal, even though the Federal Court to which the suit was removed would have had jurisdiction had the action originated there. Kappens Co. v. Continenal Casualty Co., 337 F. 2d 499, 501-502, (CA. 8-1964).

Thus, the Court of Appeals cannot obtain jurisdiction over an appeal barred under State law, even if the Court would have had jurisdiction of a similiar appeal brought in the name of the United States under 18 U.S.C. Section 3731.

The state would further premise its right to review on the federal extraordinary writ of mandamus.

This Court should not denominate as "mandamus" what has been considered an appeal for the past three and one half years, and was raised for the first time as mandamus in the Petition for Certiorari. Id. 45. If the matter can only be resolved under the mandamus statute (28 U.S.C. 1651), the Court should return the matter to the Ninth Circuit to determine if mandamus would lie. Such has been the practice of this Court when faced with matters unresolved by the lower courts. United States v. Sanford, 429 U.S. 14(1976); Cardinale v. Louisiana, 394 U.S. 437(1969).

The writ of mandamus is not the equivalent of the automatic right of review as the state would have us believe; the First Circuit in reviewing the right has held:

> ...we, as does the First Circuit... regard the Writ as extraordinary,

> reserved for rare cases of compelling need and decline, where others might not...its issuance, where on the record presented the matter under scrutiny is or may be use, non-use or mis-use of discretionary power, In re Turpentine & Rasin Factors, 238 F. 2d 458, 459, (CA.1-1956) Citations omitted).

Granted that the First Circuit admitted that other circuits might not be so strict, yet, this Court has held that the writ should issue only in extraordinary and unusual circumstances, not in lieu of an appeal or to review errors of judgment below:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequences of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is clearly an inadequate remedy. We are unwilling to utilize them as substitutions for appeal. As extraordinary remedies, they are reserved for really extraordinary causes. Ex parte Fahey, 332 U.S. 258, 259-260 (1947); Virginia v. Paul, 148 U.S. 107 (1893).

Chief Justice Taft in 1925 decided the case of Maryland v. Soper (No. 1), 270 U.S. 9 (1925). Not surprisingly at that time, the case involved revenue agents who held their commission from the Commissioner of Internal Revenue. Id. 27. Although the issue turned upon the question of whether the parties arrested were revenue agents within the meaning of the then removal statute (Section 33 of the Judicial Code), the Court in considering the efficacy of a mandamus proceeding found:

> The state by its petition for mandamus becomes a suitor at the bar of this Court to challenge the legality of the inferior court's action. Conceding the validity of the exceptional use of the national supremacy in a proper use, it seeks this writ to test its propriety here. Except by the issue of mandamus, it is without an opportunity to invoke the decision of this Court upon the issue it would raise. The order of the United States District Judge in refusing to remand is not open to review on a writ of error and a judgment of acquittal in that court is final. Id. 29-30

The clear implication is that in 1924,

the date of the decision, the Chief Justice of this Court recognized the lack of appellate review in the states in a criminal prosecution. Also, at the time, there was an appellate statute which provided limited appellate rights to the federal prosecution. United States v. Wilson, 420 U.S. 332, 336-337, 43 L. Ed. 2d 232(1975). This holding by the Chief Justice is certainly recognition of the state's inability to appeal.

Maryland v. Soper (No. 1), supra, is certainly not authority for the proposition that any case invoking a removal should have ready access to mandamus. The concern of Justice Taft, as is apparent from the language above, was not to grant review by means of mandamus of every alleged defect in a proceeding removed from the state court but to make all assurances that the case was properly removed in the first instance. Id. 30.

Because the case could not be reviewed by appeal, the Court felt that mandamus should be made more liberal to test the jurisdiction of the Court in the removal proceedings. There in no indication in the decision that a review of the basis for an entry of judgment of acquittal would negative traditional standards of mandamus.

The theory for mandamus appears to be that the Court had no right to enter a judgment sua sponte for acquittal, and even if the Court had the ability to enter the judgment, it lost the right through lapse of time. State's Brief, 73 et seq.

The Petitioner does not dispute the fact that it sought reconsideration of the order granting the Motion in Arrest of Judgment (in the opinion of the Respondent a Motion for Judgment of Acquittal, supra). CR. 137. There was therefore a proper order issued in

less than a month, had not the Petitioner sought and received additional consideration. CR. 148-150.

Petitioner cites United States v. Smith, 331 U.S. 469(1947) in support of the proposition that time in post-verdict motions is jurisdictional. One striking difference exists in that Smith reviewed and reconsidered the case on its own initive. Id. 471. In the present case, the Petitioner aggressively moved the Court for rehearing and now objects because the Court retained jurisdiction and vacated its former order. CR. 148 and CR.149.

One of the holdings of the Smith decision was that a motion made by Defendant for new trial, if made during the then five day time interval, may be considered indefinitely for the purpose of mature reflection:

> The trial judge is given power by the Rules to entertain motions for new trial within five days after

> verdict and may extend that time for so long as he thinks necessary for proper consideration of the trial. Id. 475-476. (Emphasis Added)

A reconsideration of a case by the Court and its ability to set aside or recall a judgment has been recognized by this Court even in appellate circumstances. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238,244, 64 S.Ct. 997, 88 L. Ed. 1250(1940). See also American Iron and Steel Institute v. E.P.A., 560 F. 2d 589 (CA.3-1977). Petitioner's only complaint would seem to be that a reconsideration and setting aside of a judgment, even when requested by the state, is proper only in those cases where the new order or judgment is in its favor.

However, to hold that any action taken on September 28th, 1977 was a nullity is to invite risks, since in the absence of jurisdiction to set aside the order granting the motion in arrest of judgment, the previous order granting the order in arrest of judgment still

exists and the appeal period has expired. On the order in arrest of judgment, the Court should dismiss the appeal as untimely. Ludington Lumber Co. v. Metropolitan National Bank, 55 F. 2d 169 (CA. 7-1931). Although Ludington is a civil case, the principal that a motion must be ruled upon or jurisdiction retained by proper order would appear to be the only analogy to Petitioner's claim of no jurisdiction. If we accept Petitioner's logic the failure to act in a timely manner deprived the District Court of its right to enter a judgment of acquittal in 1977 and the state is deprived of its right to appeal for untimeliness. If the Court has no jurisdiction to enter a judgment of acquittal because of untimeliness, it certainly has no right to set aside its prior order granting an arrest of judgment.

If the judge's actions were untimely and/or without jurisdiction as to the consideration of

the motion for arrest of judgment as a motion for judgment of acquittal, the vacating of the order in arrest of judgment must also be untimely, since the plain import of the order was to permit the entertaining and granting of a motion for judgment of acquittal. The state cannot dissect the opinion to its own benefit, selecting the order for purposes of negativing the order in arrest of judgment and denying to the Court the ability to rule on the judgment of acquittal:

> All parts of an order must be read together, and the order considered as a whole; and, when a court is called on to choose between a construction which gives significance to all clauses of an order and another which makes one of the clauses meaningless, the former is preferred. 60 C.J.S., Motions and Orders, 64, p. 110.

This Court should not denominate as a mandamus what has been considered an appeal for almost three years. There are compelling reasons for such a limitation in this Court. The only issue before this Court is: Was the

Court of Appeals correct in holding that the state has no right of appeal. If this Court should rule that there is a right of appeal, the matter should be remanded to the Court of Appeals for consideration on its merits. This Court has always demonstrated the utmost deference to its lower appellate courts or the courts of the state in not deciding issues unresolved by a lower court. United States v. Sanford, 429 U.S. 14, 50 L. Ed. 2d. 17(1976); Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed. 398(1969).

If this Court finds that there are no appellate rights, it may remand the case to the Court of Appeals with specific instructions to consider if the substantive and procedural requirements of an extraordinary writ are present. Both parties may brief the issue of extraordinary relief and permit the whole court, not just Judge Kennedy alone, to decide the issues of review under this proceeding.

The Ninth Circuit is capable of determing these issues and judicial restraint and courtesy dictates that the Court of Appeals be allowed to do so.

I(A)

§1291 OF 28 USC HAS CONSISTENTLY BEEN HELD TO BE INAPPLICABLE TO FINAL CRIMINAL JUDGMENT AND DECISIONS

The Solicitor General's brief states (p. 4) there is ". . . no doubt that the language of 28 USC 1291 authorizes the appeal taken in this case." On the contrary, the weight of opinion appears to be that §1291 does not furnish the state of Arizona, or any other capacity, a vehicle for appeal in a criminal case.

In U.S. v. Sanges, 144 US 310 (1892) this Court reviewed at length case law from various jurisdictions and concluded ". . . it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was

rendered upon a verdict of acquittal, or upon the determination by the court of a question of law." Sanges, supra, 312. This Court in Sanges also concluded that, generally speaking, English common law would only tolerate a writ of error or new trial in favor of a defendant, not the sovereign. Finding no express authorization in the Judiciary Act of 1891 for an appeal by the United States, this Court cautioned that it was ". . . impossible to pressure an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." Sanges, supra, 323.

The Petitioner's brief, like that of the Solicitor General's, seems to indicate that Sanges is an anachronism, a historical curiosity, a unique and short-lived aberration. This is simply not the case. This common law aversion to appeals by

the prosecution in criminal cases has been frequently mentioned in the years subsequent to Sanges. In U.S. v. Burroughs, 289 US 159 (1933) this Court reaffirmed that "In the absence of express statutory authority, no appeal may be taken on behalf of the United States in any criminal case." Burroughs, supra, 161. The Court cited Sanges as authority.

In Carroll v. U.S., 354 US 394 (1956) an appeal by the United States from adverse rulings as to pretrial suppression motions, this Court noted that ". . . in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress . . ." Carroll, supra, 400. Morever, in DiBella v. U.S., 369 US 121 (1962) also an appeal

by the United States from adverse rulings on suppression motions, this Court, citing both Sanges and Carroll, specifically mentioned ". . . the historic policy . . . that denies the Government the right of appeal in criminal cases save as expressly authorized by statute." DiBella, supra, 130. Analysis of the proposition that §1291 provides the state of Arizona a vehicle for appeal in the instant case should begin, therefore, with recognition of the axiom that absent specific statutory authorization, no Governmental entity is entitled to a right of appeal.

A brief examination of §1291 reveals that it does not expressly authorize an appeal, even by the United States, in a criminal case. This Court has acknowledged that fact. "No such expression appears in 28 US §1291, and the Government's only right of appeal, given by the Criminal Appeals Act of 1907, 34 Stat 1246,

now 18 USC §3731, is confined to narrowly defined situations . . ." DiBella v. U.S., 369 US 121, 139 (1962). "Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 USC §3731, and the Criminal Appeals Act is strictly construed against the Government's right of appeal, Carroll v. U.S., . . ." Will v. U.S., 389 US 90, at 96-97 (1967). Repeatedly, §3731 has been recognized as the express statutory authorization for such an appeal, without mention of §1291, and despite the fact this latter statute and its precursors have been long extant. U.S. v. Wilson, supra. U.S. v. Jenkins, 420 US 358 (1975). U.S. v. Sisson, supra. U.S. v. Martin Linen Supply Co., supra. U.S. v. Beck, 438 F2d 203 (CA3 - 1973), cert. den. 414 US 1132 (1974). U.S. v. Jaramillo, 510 F2d 808 (CA9 - 1975).

In U.S. v. Hines, 419 F2d 173 (10th Cir 1969), the United States' attempt to bottom an appeal upon §1291 was expressly rejected. Understandably enough, the court cited DiBella, supra, as authority, and noted that ". . . the Government's only statutorily created right of appeal in criminal cases is given by 18 USCA §3731." Hines, supra, at 174.

The Ninth Circuit in Umbriaco v. U.S., 258 F2d 625, at 626 (CA9 - 1958) unequivocally held "The grant to the Government of the right of appeal is exclusively contained in 18 USCA §3731." The court rejected §1291 as an alternate basis for the United States' appeal.

This Court's decisions in DiBella and Will, supra, in conjunction with the 9th Circuit's Umbriaco opinion, supra, were relied upon by the 3d Circuit in Government of the Virgin Islands v.

Hamilton, 475 F2d 529 (3d Cir 1973). In Virgin Islands the court also rejected §1291 as an appellate vehicle for the United States in criminal cases, concluding that provision ". . . does not provide the statutes authority which the decisions require." Virgin Islands, supra, at 531.

What is even more interesting in Virgin Islands v. Hamilton, supra, is the close parallel between that case and the instant case.

In Hamilton a defendant was convicted of three criminal charges, appealed to the district court of the Virgin Islands, where the convictions were overturned for insufficiency of the evidence. Id. 530. An appeal was attempted to the United States Court of Appeals for the 3d Circuit. Id. 529. The court held that 28 USC §1291 was no more available to a proceeding in the nature of a state

action for a criminal appeal in federal court than to a federal criminal appeal in the absence of express federal authority under 18 USC §3731. Id. 531.

The Virgin Islands do not receive all the benefits of the federal judicial system and are not considered the "United States" for judicial procedures, including appeal. Rivera v. Government of Virgin Islands, 375 F2d 988, 991 (CA3 - 1967) but are considered "states" for judicial appellate purposes.[1] In Rivera the court denied the contention that a failure to indict Rivera by grand jury was a deprivation of his fifth amendment right, the

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[1]The federal statutes traditionally have treated the possessions and territories as states for federal purposes, their definition being ". . . the several states, the District of Columbia, Puerto Rico, the Virgin Islands and Guam." 18 USC §43.

court held:

> In this respect the traditional procedure in the Virgin Islands is in accord with the modern trend to move in the direction of abolishing the grand jury as cumbersome and outmoded. Movement in that direction was made possible by the ruling by the Supreme Court in Hurtado v. People of State of California (citation omitted) that due process of law required of the states by Fourteenth Amendment was not meant to include the institution and procedure of a grand jury in any case. Id. 991. (Emphasis added)

Thus, Rivera's right in the federal court unless expanded by federal statute are the same as the states. Id. Read together with Hamilton, it is thus evident that state appellate rights to appeal cannot be supported by 28 USC §1291 but must be derived from express federal statute.

As the Solicitor General's brief (p. 5) points out, Carroll, supra, does suggest that §1291 may, in some cases, provide a basis for appeal. However,

the court described these instances as "very few", and only where they touched upon matters ". . . found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders . . ." Carroll, supra, at 403. As examples, the court noted orders relating to the amount of bail, motions for the return of seized property and motions to suppress made prior to indictment, in a different district or after dismissal. These instances deal with matters collateral to a criminal prosecution which are independent and seperable from the main plan of prosecution. U.S. v. Nardolillo, 252 F2d 744 (CA1 - 1958). In the case of motions aimed at evidence of property, "Only if the motion is soley for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as

independent." DiBella, supra, at 131-132. In Carroll the court specifically rejected the notion that a motion made by an accused after indictment and in the district of trial could fall within the ambit of "independent" orders appealable pursuant to §1291. Carroll, supra, at 404.

The Solicitor General's brief (footnote 6, p. 5) asserts that §1291 does not restrict its application to civil cases, pointing out that the prosecution may appeal from adverse decisions under 28 USC §§2254, 2255. Contrary to the Solicitor General's assertion, habeas corpus proceedings are not "criminal in nature." Habeas corpus proceedings are technically "civil" in nature. Fisher v. Baker, 203 US 174 (1906); Schlanger v. Seamans, 401 US 487 (1971). Of course, this Court has also pointed out that, more properly, habeas corpus proceedings should be viewed as unique. Harris v. Nelson,

394 US 286 (1969). It is simply incorrect, however, to describe them as "criminal".

Even more misleading is the Solicitor General's assertion that grand jury proceedings are appealable under §1291, citing In re Grand Jury Empanelled February 14, 1978, 597 F2d 851 (3d Cir 1979). (footnote 6, p. 5). In that case, the 3d Circuit relied upon §1291 as the basis for an appeal only if grand jury proceedings were not construed to be "criminal proceedings" within the ambit of §3731. Indeed, the court stated ". . . we have no doubt that a grand jury proceeding is a 'criminal proceeding' . . ." Grand Jury, supra, at 857. And as already noted, this Court in Carroll specifically emphasized the necessity for independence from the mainstream of a criminal prosecution before its exception allowing government appeal pursuant

to §1291 will be triggered. The Solicitor General has chosen rather curious authority for the proposition that §1291 is not restricted to civil cases.

As stated by this Court in Carroll, ". . . it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." Clearly, Congress did not choose §1291 as a point of departure.

I(B)

THE TENTH AMENDMENT DOES NOT FURNISH THE STATE OF ARIZONA A LEGITIMATE MEANS OF ATTACKING 18 U.S.C. 1291.

The Tenth Amendment to the United States Constitution states that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

In United States v. Darby, 312 U.S. 100, 124(1940), this Court concluded that the Tenth Amendment is "...but a truism that all is retained which has not been surrendered," and that "...nothing in the history of its adoption...suggest(s) that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."

This Court also concluded that the federal government has the authority "...to resort to all means for the exercise of a granted power as are appropriate and plainly adapted to the permitted end." United States v. Darby, supra, 124.

The Tenth Amendment is a curious weapon by which to assail the Congressionally-erected framework of the federal criminal judicial system. It is particularly inappropriate in the instant case, since the "wrong" complained of is the inability of the state to pursue an appeal. As discussed elsewhere in this brief (Section I, supra), the right of the state or federal government to appeal is an extraordinary right, one the common law viewed with disfavor or prohibited. Id.

Such an attitude by the common law made the existence of such right not a matter of custom or usage but a reluctant previlege granted only by statute.

Thus, a statutory right requires a specific statutory authorization which, for whatever reason, Congress has not granted the states in 18 U.S.C. 3731. This case hardly presents an instance which has "...the effect of coercing, destroying or impairing the autonomy of the states." State of Vermont v. Brinegar, 379 F. Supp. 606, 616 (D. Vt. 1974). Charles C. Steward Machine Company v. Davis, 301 U.S. 548 (1937). State of Oklahoma v. United States Civil Service Commission, 330 U.S. 127(1947). Nor is it an exercise of Congressional power "...in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n. 7. (1974). Interestingly enough, this Court in Fry, cited by the State in support of its argument regarding the Tenth Amendment, Petitioner's brief, pp. 64-65, concluded that wage restriction regulations were "...no such drastic invasion

of state sovereignty." Fry, 547 n. F.

Moreover, the Tenth Amendment cannot be viewed as restricting Congressional activity within a sphere of power delegated to the Federal government. Case v. Bowles, 327 U.S. 92(1946). Fernandez v. Wiener, 326 U.S. 340(1945). Maryland v. Wirtz, 392 U.S. 183(1968). Congress clearly has the power to "ordain and establish" the inferior Federal Courts, Art. 3, 1, UNITED STATES CONSTITUTION, and to regulate the procedures of those courts. Allen v. Board of Elections, 393 U.S. 544 (1969). South Carolina v. Katzezbach, 383 U.S. 301(1966). Granted, this power to prescribe procedures employed by the Federal courts is limited by the Constitution. Rogers v. Loether, 467 F. 2d 1110(7th Cir. 1972), Aff'd 415 U.S. 189(1974). In the instant case, the removal statute, 28 U.S.C. 1442(a)(1), "was designed to effectuate the supremacy of the Federal Government by protecting persons

acting under color of Federal law for State prosecutions for acts performed within the proper scope of their Federal authority...It also serves to provide a Forum for a defense based on official immunity, free from local bias." Petitioner's Brief, p. 68. Tennessee v. Davis, 100 U.S. 257(1880). Colorado v. Symes, 286 U.S. 510(1932). Willingham v. Morgan, 395 U.S. 402(1969). The State of Arizona, in any event, does not contend the statute is unconstitutional per se, Petitioner's Brief, p. 65, but merely unconstitutional as affected by 18 U.S.C. 3731. However, Federal legislation does not contravene the Tenth Amendment merely because it impacts upon a matter concurrently within the interest of the State. Sperry v. Florida, 373 U.S. 379(1963). As suggested, Congress certainly has the right to prescribe procedure within the Federal courts, to include a designation of who may appeal. The Tenth

Amendment cannot, therefore, rectify or remedy Congress' Failure to grant the State a right of appeal within the Federal judicial system.

The Tenth Amendment, as the State of Arizona has attempted to apply it in the instant case, is the proverbial square peg in the round hole. Such a use is simply incompatible with the history and interpretation of the Tenth Amendment.

I(C)

THE STATE OF ARIZONA CANNOT EMPLOY THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO ATTACK 18 USC 3731

While "ordinary federal defendant(s)" (Petitioner's Brief, pp. 70-71) all over the nation are no doubt gratified that the State of Arizona has championed their cause, the State clearly lacks standing to raise an equal protection challenge to 18 USC §3731. Fleming v. Rhodes, 331 US 100 (1947) Alabama State Federation of Labor v. McAdory 325 US 450 (1945). Rosenthal v. New York, 226 US 260 (1912). Massachusetts v. Mellon, 262 US 477 (1923).

Indeed, the state has readily conceded this point. Petitioner's Brief, 71, n. 18. This Court should not predicate a decision upon the anticipation of future constitutional challenges by a group not presently in existence which may never press this equal protection argument. There are enough genui

issues to be determined by this court without the necessity of dredging up hypotheticals. As this Court has stated, in a similar vein, "...we decline to be drawn into an abstract discussion of the numerous complex issues that might arise...They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants." Maryland v. Wirtz, 392 U.S. 183, 200(1968).

II

THE QUESTION OF FEDERAL SUPREMACY WAS CORRECTLY RAISED BY THE RESPONDENT IN MOTIONS TO DISMISS AND MOTIONS FOR JUDGMENT OF ACQUITTAL

Both the majority and the dissent have emphasized the fact that immunity was not raised as a defense in the district court. State v. Manypenny, supra, 1199 and 1205.

Apparently, Judge Kennedy to execute the coup de main of this case suggests that the Respondent should have presented an immunity defense as a factual question for the jury:

> I do note that Clifton did not create a new defense. The immunity defense for federal officers has been in existence since In re Neagle, 135 US 1, 10 S.Ct. 658, 34 L.Ct. 55 (1890). Id. 1205.

Even the most cursory inspection of Neagle reveals that the case arose under a writ of habeas corpus to release Neagle from the custody of the county sheriff not

under any trial on the merits: Id. 135 US 1. The decision was based upon the right of the United States to protect its officers from the state intrusive action while in the performance of official federal duties. Id. 75. Nowhere is it suggested that there should be any trial of the whole issue of guilt or innocence, any instructions to the jury or any formal announcement of any defense of immunity. Id. The question was considered to be one of law for the court, not fact for the jury, and asserted that the determination of the right to release was a matter of federal interest:

> To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by law of the United States, which is was his duty to do as marshal of the United States, and if in doing that act he did no more than

> what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. In Re Neagle, supra, 75.

The Court of Appeals, in speaking of the presentation of the defense of immunity, probably were referring to the case of United States ex rel. Drury v. Lewis, 200 US 1, 26 S.Ct. 229, 50 L.Ed 343 (1906) were the court suggested that a jury question was presented by the defense of immunity. The suggestion made in Drury has found very little acceptance in the years since its pronouncement, most of the cases being determined in the context of a habeas corpus proceeding. Such was the case in Clifton v. Cox, 549 F2d 722 (CA9-1977), the case principally relied upon by Judge Frey, which held that the question of jurisdiction of federal officer was a matter for decision for the court,

not a jury:

> The issue of petitioner's scope of authority presents a question of law which we find was properly resolved by the district court. Id. 726 (Emphasis added)

To the knowledge of this writer, the Ninth Circuit has not held that the question of federal supremacy is a matter for the jury's consideration, Cox rightfully followed Neagle in stating that the federal courts would delineate federal jurisdiction:

> One of the basic tenets in the application of the supremacy clause is that the states have no power to determine the extent of federal authority. To rule otherwise would allow a state to punish the exercise of federal authority under the guise of questioning the right of federal officials to act. Id. 730.

The position that a jury should be permitted to decide the question of federal supremacy and jurisdiction, as suggested by Judge Kennedy, is to suggest that the federal district court abdicate its

function and responsibility to the tender mercies of the jury. Nor is Judge Kennedy correct in his assertion that the failure to seek a jury instruction might ". . . have been a deliberate trial strategem." State v. Manypenny, supra, 1205. The issue of the right of the state to prosecute the Respondent was always treated by him as a legal question and was posed as such throughout the trial of the action.

As was stated in Brown v. Cain, 56 F. Supp. 56 (D.C. Pa. - 1944), the case principally relied upon throughout by the Respondent:

> I have no doubt that a guard in the service of the United States, protecting the plant of a vital war industry, who, in the performance of his duty, does an act for which the state authorities propose to prosecute him, should be half amenable to the law of the United States and to no other. Id. 60.

The issue of immunity may not have been specifically enunciated in the trial of this action. However, the proposition

that the officer was not answerable to the state while performing his duties as an immigration officer, on a federal reservation was the basic thrust of the Motion to Dismiss, CR. 79, filed prior to trial, where after stating the above law from Brown v. Cain, the motion stated:

> The case at bar is even more persuasive for the protection of the officer from state prosecution, since the act in question no (sic.) only was done in furtherance of federal aims but was done federal soil.

The questions of the State's right to act against the Respondent were raised throughout the proceedings, and although the magic word "immunity" was not mouthed, but the concepts of federal supremacy, which is the foundation of any immunity, were certainly presented. See CR. 73-79; CR. 120-125; R 132 & 348.

II(A)

WHERE A JURISDICTIONAL DEFECT IS NOT APPARENT ON THE RECORD, A MOTION FOR JUDGMENT OF ACQUITTAL IS THE PROPER METHOD OF TESTING THE JURISDICTIONAL DEFECT, NOT A MOTION IN ARREST OF JUDGMENT. THE COURT WILL LOOK TO FORM NOT SUBSTANCE.

A motion in arrest of judgment, challenging the jurisdiction of the court, must be based upon only the following matters of record: "...indictment, the plea, the verdict... and the sentence." Cited in Footnote 10, United States v. Sisson, 399 U.S. 267, 281, 26 L. Ed. 2d 608(1970).

If the indictment and other pleadings are sufficient on their face, then the motion in arrest of judgment will not lie and is improper, United States v. Daniel, 6 Wheat. (U.S.) 542, 5 L. Ed. 326(1821); United States v. Green, 350 U.S. 415, 416, 100 L. Ed. 494(1955).

In the present case, there is not doubt that on both occasions i.e. the ruling of November 30th, 1976(CR.137) and September 28th, 1977(CR.156), that the Court ruled upon the

post verdict motions. It was necessary to go beyond the face of the record and inspect the evidence to determine if the State could rightfully try the Respondent. As an example, in order to make its decision on either occasion concerning the ability to try the Respondent on a federal national monument or upon an Indian reservation, the Court had to examine the Attachments to the Motion to Dismiss in the first instance and the testimony of the witnesses as the trial progressed. CR.73. On the question of the Respondent being within the course of his employment and acting in the pursuance of his official duties, testimony had to be heard, since no information could be gleaned from the indictment, the plea, or the verdict. In sum, the importance of evidence considered by the Court, in its resolution of the question of the State's right to try the Respondent, must necessarily be in addition to the record. Since the motion in arrest of

judgment dealt with matters far beyond the face of the record as outlined above, the motion was in effect a motion for judgment of acquittal testing the sufficiency of the evidence and the right of the State to try the Respondent. As stated by this Court in United States v. Sisson, supra:

> For the purpose of this case, the critical requirement is that a judgment can be arrested only on the basis of error appearing "on the face of the record" and not on the basis of proof offered at trial.
>
> . . .
>
> "(A) motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, and the evidence is no part of the record for this purpose." Id. 281.

In Sisson, supra, the right of the government to appeal from an order granting a motion in arrest of judgment under 18 U.S.C. 3731 depended upon whether in fact the motion was actually one in arrest of judgment or a motion for judgment of acquittal and barred. Id. 289. The court looked beyond the designation of the

record at its implicit characteristics and found that the motion addressed the merits, was ruled upon on the basis of the merits and, thus, suspect under 3731. Id. 290. If this Court looks beyond the categorization of the motion in arrest of judgment and recognizes that the essential nature of the motion is based upon factual material adduced at the trial, there should be no question that the ruling was factual beyond the bare pleadings and the motion was raised and ruled upon in a timely fashion. Rule 29 requires that the motion for judgment of acquittal be brought within seven days and if substance is to prevail over form, the motion was well within the rules.

Additionally, the State has spent five pages of its brief (pp. 7-12) in reciting its version of the facts and argued long and strenuously concerning the nature of land upon which the incident took place and the acts of

the Respondent, none of which appears in the "face of the record" as defined above, see Response to Motion for Arrest of Judgment, App. 19. This prolonged argument unquestionably establishes that the bases of both Court rulings were factual.

CONCLUSION

The attempt has been made in this brief, perhaps inartistically, to demonstrate that if the State is to be taken at its word, i.e. that there is a right of appeal from a judgment of conviction, then this case is not difficult to resolve. There has been a failure upon the part of both Congress and, under one view, the Arizona State Legislature to provide a remedy in this case; particularly is this failure most inexplicable when considered in the light of the rulings in Tennesee v. Davis and Maryland v. Soper (No. 1). Congress need only enact legislation including the "states" within the provisions of 18 U.S.C. 3731 or in appropriate language of the removal statutes to cure this problem. But so long as the cases require an express, statutory right to appeal, the state prosecution will be left without appellate remedy.

Perhaps as equally disturbing is the

State's assertions that the proposition that 28 U.S.C. 1291 provides the State, or even the federal government, a right of appeal in criminal cases. As the case law unequivocally illustrates, 28 U.S.C. 1291 does not provide the clear and specific language necessary to create such a right. And appeal by the State or the United States from a criminal decision is contrary to the common law and may only be constructed by precise legislative action. Even a brief, uncritical examination of 28 U.S.C. 1291 demonstrates that it does not satisfy such a criterion.

The Petitioner, the Solicitor General and the appellate dissent should not ask this Court for judicial legislation to invest the State of Arizona with a right not provided in its own statutes. Nor should this Court accept the responsibility for promulgating a right of appeal based upon the facts that (1) Congress

did not statutorily prohibit a state appeal and (2) the legislative history of 18 U.S.C. 3731 demonstrates an affection for criminal appeal, even though it never mentioned states' appeals.

Because of the language in the Soper decision, supra, which evidences some concern for the right of the state to have redress in the area of removal statute, it must be said in candor that the opinion is unclear if the concern of the Chief Justice centered about the initial act of removal, which directly related to the holding, or that the decisions of the trial court should be granted review, addressed not to clear abuse of discretion but to appellate error. In any event, this Court should not rule upon the correctness of the District Court's ruling but should rather remand the case to the Court of Appeals under traditional standards of comity. This question should not be foistered upon this

Court without review by the Ninth Circuit.

The issues posed by Fifth Amendment Equal Protection argument sought by a party without standing and the simplistic view of the Tenth Amendment will not be dignified by comment in this summary, except to point out that the Court of Appeals was not blessed with either issue and this Court should not consider either.

Respectfully submitted this 23 day of July, 1980.

JAMES D. WHITNEY

AUBREY R. WILLIAMS